

# OFFICIAL CODE OF GEORGIA ANNOTATED

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## 2013 Supplement

Including Acts of the 2013 Regular Session of the General Assembly

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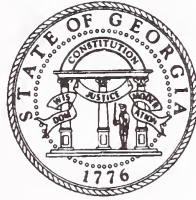
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*and*

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## Volume 2 2007 Edition

Constitution of the State of Georgia

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Including Annotations to the Georgia Reports  
and the Georgia Appeals Reports

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Main Set**

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## THIS SUPPLEMENT CONTAINS

### **Statutes:**

All laws specifically codified by the General Assembly of the State of Georgia through the 2013 Regular Session of the General Assembly.

### **Annotations of Judicial Decisions:**

Case annotations reflecting decisions posted to LexisNexis® through March 29, 2013. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

### **Annotations of Attorney General Opinions:**

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 29, 2013.

### **Other Annotations:**

References to:

Emory Bankruptcy Developments Journal.  
Emory International Law Review.  
Emory Law Journal.  
Georgia Journal of International and Comparative Law.  
Georgia Law Review.  
Georgia State University Law Review.  
Mercer Law Review.  
Georgia State Bar Journal.  
Georgia Journal of Intellectual Property Law.  
American Jurisprudence, Second Edition.  
American Jurisprudence, Pleading and Practice.  
American Jurisprudence, Proof of Facts.  
American Jurisprudence, Trials.  
Corpus Juris Secundum.  
Uniform Laws Annotated.  
American Law Reports, First through Sixth Series.  
American Law Reports, Federal.

### **Tables:**

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2013 Regular Session of the General Assembly.

**Indices:**

A cumulative replacement index to laws codified in the 2013 supplement pamphlets and in the bound volumes of the Code.

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# CONSTITUTION OF THE STATE OF GEORGIA

## Article

III. Legislative Branch.

VII. Taxation and Finance.

VIII. Education.

IX. Counties and Municipal Corporations.

XI. Miscellaneous Provisions.

## ARTICLE I. BILL OF RIGHTS

### SECTION I. RIGHTS OF PERSONS

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for Music Use in Media Applications,” see 18 J. Intell. Prop. L. 561 (2011).

For note, “The Monster in the Closet: Declawing the Inequitable Conduct Beast in the Attorney-Client Privilege Arena,” see 25 Ga. St. U. L. Rev. 735 (2009).

For comment, “I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships,” see 59 Emory L.J. 259 (2009).

## JUDICIAL DECISIONS

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CRIMINAL CASES

### General Consideration

**Personal jurisdiction.** — Because a seller sued an Illinois limited liability company (LLC) on an open account, long-arm jurisdiction over the LLC under the “transacting business” section of O.C.G.A. § 9-10-91(1) was reasonable and comported with due process. The LLC initiated the relationship with the seller and handled payment, the goods were delivered in Georgia to a Georgia apartment complex controlled by a related Georgia entity, and there was a long course of dealing between the parties. *Home Depot Supply, Inc. v. Hunter Mgmt., LLC*, 289 Ga. App. 286, 656 S.E.2d 898 (2008).

**Civil contempt order in divorce case.** — A civil contempt order in a divorce case requiring a husband to pay \$1,500 to the wife for each day that passed without him paying the wife insurance proceeds pursuant to an oral order did not violate due process; a trial court could sua sponte raise an issue of contempt, and although the order to pay the proceeds was oral, the order was not ineffective as a matter of law, as the husband was well aware that the payment of the proceeds would be at issue and that the trial court would decide the matter without a jury. *Chatfield v. Adkins-Chatfield*, 282 Ga. 190, 646 S.E.2d 247 (2007).

**County homestead tax exemptions did not violate due process.** — County homestead exemptions from ad valorem and education taxes did not violate due process or equal protection because they were rationally related to the legitimate government interests of the encouragement of neighborhood preservation, continuity, and stability, and the protection of reliance interest of existing homeowners, and the limits placed on the exemptions were not arbitrary. *Blevins v. Dade County Bd. of Tax Assessors*, 288 Ga. 113, 702 S.E.2d 145 (2010).

**Cited in** *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683, 733 S.E.2d 269 (2012).

### Necessity for Notice and Hearing

**Service of process insufficient.** — Service upon a spouse against whom a

temporary protective order had been granted under the Georgia Family Violence Act was insufficient. The original service provided the spouse with no notice of the allegations, and service upon the spouse as the spouse left a hearing in the case was improper under the rule insulating a party in attendance upon the trial of a case from service of process. *Loiten v. Loiten*, 288 Ga. App. 638, 655 S.E.2d 265 (2007).

### Statutory Notice of Proscribed Conduct

#### Sufficient definiteness of criminal statute.

Appellant, a juvenile, was not entitled to the dismissal of two counts of street gang activity based on the juvenile’s assertion that O.C.G.A. § 16-15-4(a) failed to inform ordinary citizens of what associations with a criminal street gang were prohibited under the statute; the statute required that a defendant’s association with a group be active and include the commission of an enumerated offense under O.C.G.A. § 16-15-13(1), and that provided a sufficiently definite warning to persons of ordinary intelligence of the prohibited conduct. *In re K.R.S.*, 284 Ga. 853, 672 S.E.2d 622 (2009).

### Police Power — Property

#### 4. Zoning

#### When denial of building permit not deprivation of owner’s property.

In a declaratory judgment action brought by a developer against a county seeking to invalidate an ordinance which required denial of the developer’s land disturbance permit based on two soil-related ordinance violations existing, the judgment in favor of the developer was upheld on appeal with regard to the developer’s claim for damages under 42 U.S.C. § 1983, for alleged violations of the developer’s equal protection rights in the county’s enforcement of the ordinance. The trial court properly determined that the developer was not required to prove a valid property right with regard to the developer’s equal protection challenge; the trial court properly awarded attorney fees to the developer under O.C.G.A.

§ 13-6-11 as the jury was authorized to award the attorney fees as an element of the damages it awarded on the developer's federal equal protection claim, regardless of whether the developer could prevail on any state law claim for damages; but the trial court erred by failing to address the merits of the developer's petition for a declaratory judgment since the overall enforceability of the ordinance, which was still the law, was not rendered moot by the withdrawal notice. *Fulton County v. Legacy Inv. Group, LLC*, 296 Ga. App. 822, 676 S.E.2d 388 (2009).

**Actual notice not required.** — Landowner's procedural due process rights under the U.S. Constitution and the Georgia Constitution were not violated because, although the landowner did not receive actual notice of a cellular-tower application for the adjacent property, the evidence showed that notice was sent to the landowner's record address by way of certified mail. The county did not have a duty under the zoning ordinance in effect at the time to ensure that the landowner received actual notice. *Sanders v. Henry County*, No. 11-13717, 2012 U.S. App. LEXIS 14560 (11th Cir. July 17, 2012) (Unpublished).

**City ordinance sufficiently definite.** — Trial court did not err in granting a city summary judgment in a lessee's declaratory judgment action seeking an order declaring that City of Forest Park, Ga., Ordinance § 9-8-45 was unconstitutional because the ordinance was sufficiently definite so that a person of ordinary intelligence need not guess at its meaning; although the lessee contended that the phrase "without limitation of the generality of the foregoing" opened the definition of "public sidewalk" to include any space that the city later wished to assert fell under the ordinance, the specification of parking spaces and other areas intended for public travel did not permit the interpretation the lessee contended. *Braley v. City of Forest Park*, 286 Ga. 760, 692 S.E.2d 595 (2010).

### Selection of Juries

**Jurors' employment status held as race-neutral strikes.** — Appeals court rejected the defendant's challenge to the

state's use of peremptory jury strikes against two prospective jurors due to their unemployment, as this raised questions about their community commitment, a valid and accepted concern, and held such strikes to be race-neutral and free of discriminatory intent; further, a second juror was properly stricken on the basis of that juror's unemployment, and not because the juror was a homemaker, and the record showed that the state struck a white juror on the basis of the juror's periodic unemployment. *Hodge v. State*, 287 Ga. App. 750, 652 S.E.2d 634 (2007).

**Sufficient race-neutral reasons existed for state's peremptory strikes.**

— While defendant made out prima facie case of racial discrimination regarding state's use of three peremptory strikes, because sufficient race-neutral reasons existed for said strikes, defendant's rights were not violated. *LeMon v. State*, 290 Ga. App. 527, 660 S.E.2d 11 (2008).

**Juror's statement of impartiality.** — Because defendant waived an objection to the trial court's ruling on the scope of defendant's cross-examination of a witness by failing to object, and because a juror stated that the juror could be fair and impartial when hearing the case, the trial court did not abuse the court's discretion in denying defendant's motion for a new trial. *Pinckney v. State*, 285 Ga. 458, 678 S.E.2d 480 (2009).

### Application

#### 1. In General

**O.C.G.A. § 40-6-120 was unconstitutionally vague.** — In light of the conflict in the language of O.C.G.A. § 40-6-120(a)(2), a person of common intelligence could not determine with reasonable definiteness that the statute prohibits the making of a left turn into the right lane of a multi-lane roadway. Accordingly, § 40-6-120(a)(2) is too vague to be enforced against a driver of a vehicle making a left turn into a multi-lane roadway that lacks official traffic-control devices directing the driver into which lane to turn and is, therefore, unconstitutional under the due process clauses of the Georgia and United States Constitutions. *McNair v. State*, 285 Ga. 514, 678 S.E.2d 69 (2009).

**Patients had no constitutional right to dialysis treatment.** — Trial court did not err in granting a clinic's motion under O.C.G.A. § 9-11-12(b)(6) to dismiss for failure to state a claim the patients' action alleging that the closure of the clinic violated the due process clause of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. I, Para. I, because the patients had no constitutional right to the dialysis treatment; even if the patients depended for their lives upon the free dialysis treatment the patients voluntarily received from the clinic for several years, the patients were not forced by any state-imposed restriction to become dependent, and the patients acquired no constitutional right to continue to receive the treatment. *Andrade v. Grady Mem'l Hosp. Corp.*, 308 Ga. App. 171, 707 S.E.2d 118 (2011).

**Redistricting attempts for school board members.** — While voting rights and the right to run for public office are core constitutional rights, an attempted deprivation of constitutional or statutory rights is not the same as an actual deprivation. Furthermore, incurring legal fees to vindicate rights does not itself establish that those rights were violated. Thus, plaintiff, a school board member, pursuing attempted violations of plaintiff's right to run and hold a designated seat in a pre-defined district, could not succeed as an injunction in another lawsuit and failure of preclearance interfered with the implementation of the efforts of defendants, the local voting registrars; since the attempt to deprive plaintiff of plaintiff's constitutional rights did not succeed, neither can plaintiff's lawsuit succeed. *Cook v. Randolph County*, 573 F.3d 1143 (11th Cir. 2009).

**Grant of official immunity to state employee providing medical services.** — Grant of official immunity from a malpractice suit to a state-employed doctor based on the patient's status as a Medicaid patient did not violate the constitutional rights of the patient's parents, as the due process and equal protection clauses of the U.S. and Georgia Constitutions protected only rights, and a waiver of sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et

seq., was merely a privilege. *Porter v. Guill*, 298 Ga. App. 782, 681 S.E.2d 230 (2009).

**Foreclosure on automobile.**

Failure to provide a corporation that was the original owner of a car with notice of a foreclosure proceeding involving the car was a due process violation that was tantamount to a lack of personal jurisdiction; thus, the foreclosure judgment was void under O.C.G.A. § 9-12-16. *Mitsubishi Motors Credit of Am., Inc. v. Sheridan*, 286 Ga. App. 791, 650 S.E.2d 357 (2007), cert. denied, No. S07C1842, 2007 Ga. LEXIS 751 (Ga. 2007).

**License revocation order upheld where driver afforded sufficient due process.** — Administrative decision disqualifying a driver from driving a commercial motor vehicle for life based on the refusal to submit to state-administered chemical testing and a prior conviction for driving under the influence was upheld, as the arresting officer informed the driver that the driver could lose that driver's license to drive upon refusing to submit to chemical testing, and the requirements of due process did not require the arresting officer to inform the driver of all the consequences of refusing to submit to chemical testing. Moreover, the driver requested and received a hearing under O.C.G.A. § 40-5-67.1(g)(1). *Chancellor v. Dozier*, 283 Ga. 259, 658 S.E.2d 592 (2008).

**Trial judge's inappropriate conduct of injunction hearing required reversal.** — Conduct resulting in reversible error was committed by a trial judge during an injunction hearing involving the alleged fraudulent refinancing of church property where the judge was found to have attempted to procure evidence and elicit testimony, conducted ex parte communications, and not afforded the parties the opportunity to offer evidence, give argument, or otherwise present the parties' respective cases. Further, the trial judge erred by determining that one defendant committed criminal contempt without giving that defendant an opportunity to respond to or defend against the trial judge's determination that the defendant's testimony was untruthful. *Cousins v. Maced. Baptist Church of Atlanta*, 283 Ga. 570, 662 S.E.2d 533 (2008).

## 2. Attorneys

### **Attorney's due process rights violated in contempt proceeding.**

Although a judge informed an attorney of the conduct found to be criminally contemptuous, because said judge not only refused to afford that attorney an opportunity to be heard, but also became involved in the controversy, the criminal contempt finding entered against the attorney had to be reversed. In re Hatfield, 290 Ga. App. 134, 658 S.E.2d 871 (2008).

## 3. Employment Relationships and Employees

### **Delay in holding hearing on public employee's appeal of termination.**

As a former police officer failed to show prejudice from a two-year delay in holding a hearing on the officer's appeal of the officer's termination, and the evidence supported the civil service board's decision to uphold the officer's dismissal, the delay of the appeal did not violate the officer's due process rights under Ga. Const. 1983, Art. I, Sec. I, Para. I. Glass v. City of Atlanta, 293 Ga. App. 11, 666 S.E.2d 406 (2008).

**At-will employee not denied due process.** — Because a terminated university registrar was an at-will employee, the registrar had no property interest in the registrar's job and no due process claim. Moreover, by appealing directly to an administrative law judge, the registrar was afforded a full and fair hearing, fulfilling state and federal due process requirements. Bd. of Regents of the Univ. Sys. of Ga. v. Hogan, 298 Ga. App. 454, 680 S.E.2d 518 (2009).

## 4. Family Issues

**Refusal to consider equal protection argument at hearing in deprivation.** — In a deprivation proceeding where the parents were ordered to pay part of the costs for services mandated under their case plan, there was no due process violation in refusing to consider parents' equal protection argument. Due process did not guarantee a litigant the right to have all of the litigants' arguments considered at a particular hearing. In the Interest of P.N., 291 Ga. App. 512, 662 S.E.2d 287 (2008).

### **Action for termination of parental rights.**

By not raising the issue below, a mother in a termination of parental rights case waived her arguments that the trial court violated equal protection and due process by not determining whether her mental health concerns affected her ability to complete the specific goals in her case plan; moreover, there was uncontradicted evidence that despite her mental health problems, the mother understood the case plan, appreciated its requirements, and could have completed it, but did not do so, and the mother testified that she was able both physically and mentally to care for the child. In the Interest of H.M., 287 Ga. App. 418, 651 S.E.2d 527 (2007).

In a termination of parental rights proceeding, as a parent had numerous opportunities to establish a life independent of that parent's abusive spouse, the parent's due process claim that the abusive spouse was the biggest obstacle preventing reunification lacked merit. In the Interest of D.O.R., 287 Ga. App. 659, 653 S.E.2d 314 (2007).

## 5. Right of Privacy

### **Defendant's right to privacy not violated when sexual battery victim under age of consent.**

Because the 13-year-old victim in a sexual battery case was under the age where the victim could legally consent to sexual conduct, prosecution of the defendant did not violate the defendant's right to privacy for consensual touching within the context of their boyfriend/girlfriend relationship. Engle v. State, 290 Ga. App. 396, 659 S.E.2d 795 (2008).

### **Standing to challenge Medicaid reimbursement for medically necessary abortion.**

— The trial court erroneously dismissed a complaint filed by certain medical providers, alleging violations of the Georgia Constitution on privacy and equal protection grounds, and holding that the medical providers lacked third-party standing to assert a claim on behalf of their Medicaid-eligible patients, as: (1) the medical providers properly asserted an injury in fact insofar as they had a direct financial interest in obtaining state funding to reimburse them for the

cost of abortion services provided to Medicaid-eligible women, and have alleged that they performed, and will continue to perform, medically necessary abortions for which they will not be reimbursed under Georgia's Medicaid program; and (2) the relationship between the medical providers and their patients made them uniquely qualified to litigate the constitutionality of the state's action interfering with a woman's decision to terminate a pregnancy. *Feminist Women's Health Ctr. v. Burgess*, 282 Ga. 433, 651 S.E.2d 36 (2007).

**Nonparty medical records.** — In a suit alleging medical malpractice and related claims, the trial court properly held that nonparty medical records were subject to discovery. Although personal medical records were protected by Georgia's constitutional right of privacy, the trial court's order afforded the nonparty patients with notice and an opportunity to object to the disclosure and also provided for further review to determine the scope of discovery. *Ussery v. Children's Healthcare of Atlanta, Inc.*, 289 Ga. App. 255, 656 S.E.2d 882 (2008).

### Criminal Cases

**Registration requirements for homeless sex offenders unconstitutionally vague.** — Address registration requirement of O.C.G.A. § 42-1-12 is unconstitutional under the due process clause of the United States and Georgia constitutions on vagueness grounds as applied to homeless sex offenders who possess no street or route address for their residence. *Santos v. State*, 284 Ga. 514, 668 S.E.2d 676 (2008).

**Denial of motion for mistrial did not deny defendant fair trial.** — Because the trial court issued a prompt curative instruction in response to an alleged improper vouching of the victim by a police lieutenant and took corrective measures to ensure that the jury could follow those corrective measures, the court did not deny the defendant a right to a fair trial by denying a motion for a mistrial based upon that testimony. *Cortez v. State*, 286 Ga. App. 170, 648 S.E.2d 488 (2007).

While the trial court did not necessarily

rebuke the prosecutor, because it did give curative instructions informing the jury that a cell phone used in the state's closing argument was not evidence, the demonstration was not to be considered, and the demonstration was completely irrelevant to the case, the defendant was not entitled to a mistrial as a result; further, the appeals court agreed with the trial judge that the improper demonstration did not prejudice the defendant because enough other evidence existed for the jury to come to its conclusion without relying on the improper demonstration. *Cook v. State*, 287 Ga. App. 81, 650 S.E.2d 757 (2007), cert. denied, 2008 Ga. LEXIS 127 (Ga. 2008).

Single, one-word reference to a previous trial, which reference occurred as a result of confusion as to which pretrial hearing defense counsel was referring, did not make a mistrial essential to the preservation of a defendant's right to a fair trial. Accordingly, the trial court did not abuse the court's discretion when the court denied the mistrial motion. *Smith v. State*, 284 Ga. 17, 663 S.E.2d 142 (2008).

### **Eyewitness identification pattern jury instruction cannot be endorsed.**

— In light of the scientifically documented lack of correlation between a witness's certainty in the witness's identification of the perpetrator of a crime and the accuracy of that identification and the critical importance of accurate jury instructions, the pattern instruction authorizing jurors to consider the witness's certainty in his or her identification as a factor to be used in deciding the reliability of that identification cannot be endorsed. *Brodes v. State*, 279 Ga. 435, 614 S.E.2d 766 (2005) (Unpublished).

### **Right to preservation of evidence.**

The trial court's order dismissing an indictment charging the defendant with rape, incest, aggravated child molestation, and child molestation on grounds that the state improperly failed to preserve lab samples taken from the victim was reversed because the defendant failed to show that the failure was the result of bad faith on the part of the state or the police, and the value of the sample to the defendant was only potentially exculpatory. *State v. Brady*, 287 Ga. App. 626, 653 S.E.2d 72 (2007).

There was no merit to a defendant's claim that due process had been violated because the state allowed a car in which a shooting took place to be sold from an impound lot before the car could be tested for fingerprints and other evidence. The defendant did not argue that the state had acted in bad faith, and the record did not show bad faith. *Lockheart v. State*, 284 Ga. 78, 663 S.E.2d 213 (2008).

As there was no showing that a videotape of a criminal incident and crime scene had "apparent exculpatory value" because the images were small, distorted, and non-identifiable, and the state did not act in bad faith when the state failed to preserve the tape, dismissal of an indictment against the defendant due to the state's failure to preserve the videotape was error. *State v. Brawner*, 297 Ga. App. 817, 678 S.E.2d 503 (2009).

Trial court erred by dismissing criminal charges against the defendant because the master DVD recording of the traffic stop that led to the defendant's arrest was destroyed when an investigator reformatted the DVD while attempting to get the DVD to play. The destruction of the master DVD was not a due process violation because the lost evidence was at best potentially exculpatory and there was no showing of bad faith on the part of the state. *State v. McNeil*, 308 Ga. App. 633, 708 S.E.2d 590 (2011).

**Defendant not prohibited from challenging state's evidence.** — Defendant's claim that the defendant was denied due process because the state used "false evidence" to convict the defendant failed because the defendant was not prevented in any way from challenging the state's evidence that the defendant contended was incorrect, evidence regarding the use of cell phone records to show location, and the defendant chose not to challenge the evidence. *Davis v. State*, 292 Ga. 90, 734 S.E.2d 401 (2012).

**Right to testify not violated.** — Defendant's constitutional right to testify in the defendant's own behalf was not violated. The trial court established that the defendant knew that the defendant had the right to testify if the defendant wanted to but elected not to after consulting with defense counsel. *Branford v.*

*State*, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

**The trial court did not err in denying a defendant's request as an indigent for funds to engage a psychologist** to assist in the defense when the defendant had not shown that the defendant's sanity at the time of the offense would likely be a significant factor at trial. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

**Ineffectiveness of counsel not shown.** — Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, and comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. *Hampton v. State*, 282 Ga. 490, 651 S.E.2d 698 (2007).

**Conviction reversed due to level of certainty of eyewitness identification instruction.** — Defendant's armed robbery conviction was reversed as the only evidence implicating defendant was the testimony of the two victims identifying the defendant as the perpetrator and as it was error to give the jury the pattern instruction stating that the jury could consider the level of certainty of the victims in their identification of defendant as the perpetrator of the crimes in evaluating the reliability of the identifications; one of the victims was unable to pick defendant's photo in a photo array and the other victim was able to describe to police the weapon used in the crimes but was unable to give any physical characteristics of the perpetrator. *Brodes v. State*, 279 Ga. 435, 614 S.E.2d 766 (2005) (Unpublished).

**Speedy trial.** — The trial court did not abuse its discretion in granting the defendants' motions to dismiss the charges filed against them because the court was authorized to find that, as the result of the state's negligence, both of the defendants

were subjected to an extraordinarily long delay in being brought to trial, that they were not dilatory in asserting their right to a speedy trial, and that, as a result of the delay, their ability to defend against the belated murder charge was prejudiced. *State v. White*, 282 Ga. 859, 655 S.E.2d 575 (2008).

**Mere passage of time in criminal trial is not enough, without more, to constitute denial of due process.**

While the length of the delay in bringing the appeal, 15 years, was excessive, the delay did not violate the defendant's due process rights since the delay was largely attributable to the defendant, the defendant failed to show that the defendant asserted the defendant's appellate rights for much of the 15-year period at issue, and the defendant failed to show actual prejudice to the defendant's ability to assert arguments on appeal. *Payne v. State*, 289 Ga. 691, 715 S.E.2d 104 (2011).

**Postconviction delay caused no actual prejudice.**

Defendant was not entitled to relief based on a claim that the twelve year delay caused by appointed counsel's failure to pursue the defendant's post-conviction appeals violated the defendant's due process rights, because the delay was due solely to the actions of the defendant's previous appellate counsel and the defendant failed to show prejudice. *Hargrove v. State*, 291 Ga. 879, 734 S.E.2d 34 (2012).

**Ten year postconviction delay caused no actual prejudice.** — While the 10-year delay between the defendant's conviction and the appellate hearing was an inordinate delay and the defendant attempted to assert an appeal during the delay, the delay did not violate the defendant's right to due process because the defendant failed to show prejudice. *Brinkley v. State*, No. A12A2322, 2013 Ga. App. LEXIS 169 (Mar. 11, 2013).

**Burden of persuasion as to venue.**

Because a police officer testified that defendant sold methamphetamine from defendant's residence, the state met the state's burden of proving beyond a reasonable doubt that venue of the crimes charged was properly in the county in which defendant was tried; therefore, the

trial court properly denied defendant's motion for a new trial. *Borders v. State*, 299 Ga. App. 100, 682 S.E.2d 148 (2009).

**Defendant's right to be present not violated.**

The trial court did not violate a defendant's right to be present when it responded to two jury questions, one asking if the crime was a misdemeanor or a felony, the other asking if there would be leniency considerations. The trial court responded only that these were not matters for the jury's consideration, and it formulated its response in the presence of trial counsel. *Engle v. State*, 290 Ga. App. 396, 659 S.E.2d 795 (2008).

**Adequate accommodation for defendant's hearing loss.** — Defendant's claim of a due process violation because the defendant's hearing impairment prevented the defendant from comprehending the witnesses' testimony was properly rejected. The trial court accommodated the defendant by moving the defendant closer to the witness stand and obtaining a hearing device for the defendant to use, and the defendant's conduct during the trial and statements to defense counsel indicated that the defendant was able to understand the testimony. *Neugent v. State*, 294 Ga. App. 284, 668 S.E.2d 888 (2008).

**Marijuana statute did not create mandatory presumption of guilt.** — O.C.G.A. § 16-13-2(b) did not violate due process by creating a mandatory presumption of guilt. The court interpreted the statute as the court had before to render the statute valid and to carry out the legislative intent of establishing that possession of an ounce or less of marijuana was a misdemeanor. In the Interest of D. H., 285 Ga. 51, 673 S.E.2d 191 (2009).

**Court required to make findings on Mandarin Chinese speaker's competency to stand trial without interpreter.** — Trial court erred in denying a defendant's motion for new trial based on the defendant's contention that the defendant did not understand the proceedings because an interpreter was not provided to the defendant without making findings; there was sufficient evidence to raise a question as to whether the defendant,

whose native language was Mandarin Chinese, was competent to be tried without an interpreter, and the trial court was required to make findings as to the defendant's competency on the record. *Ling v. State*, 288 Ga. 299, 702 S.E.2d 881 (2010).

**Defendant did not establish Brady violation.** — A Brady violation was not established where the defendant knew the identity of a confidential informant (CI) before trial and that the CI had made a deal with the prosecution, had included the CI on the defense's witness list, and introduced evidence of the CI's indictment for drug trafficking. Even assuming, arguendo, that the defendant was not aware of all the circumstances surrounding the deal before trial, the defendant did not show that earlier disclosure would have benefitted the defendant and that any delay deprived the defendant of a fair trial. Therefore, the defendant was not entitled to a mistrial based on a Brady violation. *Alford v. State*, 293 Ga. App. 512, 667 S.E.2d 680 (2008).

Under Brady, a defendant did not show that the state agreed to any sort of deal with an accomplice witness in exchange for the witness's testimony. To the extent that the witness or the witness's counsel hoped that the witness's testimony would later benefit the witness, their subjective hopes were not evidence that a deal existed; there was no evidence that the prosecutor encouraged the witness or the witness's lawyer to believe that the witness would benefit from testifying against the defendant; and the fact that the state ultimately cooperated with counsel's efforts to reduce the witness's sentence did not prove that the state and the witness had a deal prior to the defendant's trial. *Varner v. State*, 297 Ga. App. 799, 678 S.E.2d 515 (2009).

**Confrontation rights were violated, but admission of hearsay evidence was harmless,** given the overwhelming evidence of the defendant's guilt, the fact that the victim's taped account of the argument between the defendant and the defendant's wife was cumulative to, and corroborative of, the defendant's own testimony, and as the erroneously admitted hearsay evidence did not contribute to the verdict. *Delgado v. State*, 287 Ga. App. 273, 651 S.E.2d 201 (2007).

**Identification procedure not overly suggestive.**

A photographic lineup was not impermissibly suggestive when all six photographs depicted people of the same race, gender, and general age range as the defendant, with similar hairstyles and facial hair; the defendant's orientation to the camera was the same as that of several other photographs; the head shots in several of the pictures were similar to that of the defendant; and all of the pictures had slightly different backgrounds. It could not be assumed that the fact that the defendant's picture was in the center of the top row gave it greater prominence. *Russell v. State*, 288 Ga. App. 372, 654 S.E.2d 185 (2007).

Because: (1) victim's identification of defendant was based upon independent memory which victim fairly accurately recalled in developing the composite sketch; (2) there was independent basis for victim's identifications; and (3) there was no substantial likelihood of misidentification under these circumstances, trial court did not err in admitting the identification evidence and trial court's finding that there was no likelihood of misidentification was supported by the record. *Price v. State*, 289 Ga. App. 763, 658 S.E.2d 382 (2008).

Trial court did not err in concluding that one-on-one show-up identification was reliable despite any possible suggestion implied by officers when they told the victim that they had found the person that robbed the victim and were seeking a warrant; victim had adequate opportunity to view the robber at the scene in adequate lighting, the robber even demanded that the victim stop looking at the robber, clothing matching that of the robber matched clothing found in the defendant's apartment, and length of time between the crime and confrontation was less than two hours. *Ford v. State*, 289 Ga. App. 865, 658 S.E.2d 428 (2008).

Photographic lineup was not impermissibly suggestive because the defendant was the only one pictured with an open mouth, revealing gold teeth, and the victim had identified the perpetrator as having bottom gold teeth. It was not readily apparent that the defendant's top teeth,

the only ones visible, were gold, and apart from the defendant's mouth being open slightly, the lineup depicted people with similar skin color, hair, and overall appearance. *Varner v. State*, 297 Ga. App. 799, 678 S.E.2d 515 (2009).

Photographic array was not impermissibly suggestive. The people in the lineup had facial features similar to the defendant's, and at least three had slanted eyes; the fact that the defendant's picture was smaller, lighter in color, grainier, and less focused and the fact the defendant's head was more tilted did not make the array impermissibly suggestive; and the defendant failed to explain how the "full-face" lineup conducted here (as opposed to a lineup obscuring all facial features other than the eyes) was impermissibly suggestive. *Pinkins v. State*, 300 Ga. App. 17, 684 S.E.2d 275 (2009).

#### **Showup found reliable.**

Eyewitness identifications were not impermissibly suggestive as the police did not instruct armed robbery victims to identify a defendant at the showup but advised the victims that they would be asked if they could identify two individuals arrested in connection with another incident; the identifications, even if they had been suggestive, were reliable as the parking lot where the incident occurred was well-lit and the showup procedure occurred shortly after the robberies. *Billingsley v. State*, 294 Ga. App. 661, 669 S.E.2d 699 (2008).

#### **Admissibility of breath test results.**

Court of appeals did not err in reversing an order granting the defendant's motion to suppress evidence of the state's breath test results because the procedures followed by the state comported with the fundamental fairness required by due process; the police officer delivered to the defendant the required implied consent notice in an accurate and timely manner, thereby informing the defendant of the right to an independent test under O.C.G.A. § 40-6-392(a)(3), and thus, the state was under no constitutional duty to immediately inform the defendant of the results of the state-administered breath test. *Padidham v. State*, 291 Ga. 99, 728 S.E.2d 175 (2012).

#### **No due process violation because**

#### **hard choices on intoxication testing.**

— State's failure to immediately inform a defendant of the results of the state-administered test does not create a situation where the defendant is left with no, or so little information, that he or she is denied any meaningful choice in violation of due process; driving under the influence defendants must determine, often under difficult and stressful circumstances, whether to request an independent test, and that the choice may be difficult does not render it fundamentally unfair and this fact alone does not support a due process claim. *Padidham v. State*, 291 Ga. 99, 728 S.E.2d 175 (2012).

#### **Results of field sobriety tests. —**

Suppression of field sobriety tests was probably denied since the defendant: (1) was not in custody for the purposes of *Miranda* when asked to perform the tests; (2) did not make any statement or take any overt act which would have caused a reasonable person to believe that the encounter was anything more than a temporary detention; and (3) voluntarily submitted to the tests. *McDevitt v. State*, 286 Ga. App. 120, 648 S.E.2d 481 (2007).

#### **Jury charge did not deprive defendant of alibi defense or fair trial right. —**

Given that the exact date the charged child molestation offense was alleged to have been committed was not stated as a material allegation in the indictment, the trial court did not erroneously instruct the jury that the indicted offenses could be proven to have occurred at any time within the statute of limitations, as the defendant failed to show either the deprivation of an alibi defense or a right to a fair trial resulted by issuing the instruction. *Brown v. State*, 287 Ga. App. 857, 652 S.E.2d 807 (2007), cert. denied, No. S08C0393, 2008 Ga. LEXIS 154 (Ga. 2008).

#### **No violation of defendant's fair trial rights when shackles were used at trial. —**

There was no error by a trial court's denial of a defendant's request to have leg shackles removed during the trial as the shackles could not be seen by the jurors, the trial court took additional measures to ensure that the jurors were unaware of the shackles, and consideration was given to appropriate circum-

stances; the shackles were not shown to interfere with the defendant's ability to have a fair trial. *Council v. State*, 297 Ga. App. 96, 676 S.E.2d 411 (2009).

**Jurors as convicted felons.** — Although state notified defendant and trial court soon after trial that two jurors were convicted felons, because there was no evidence establishing the identity of either juror, documenting the convictions, or showing that either had not had their rights restored, defendant's due process rights were not violated; thus, denial of motion for new trial on this ground was proper. *Jones v. State*, 289 Ga. App. 767, 658 S.E.2d 386 (2008).

**Increasing time served on remand.** — On remand, it was error for the trial court to increase the amount of time the defendant was to serve and to threaten to increase the time once again if the defendant took another appeal. Due process required that vindictiveness play no part in the sentence a defendant received. *Schlanger v. State*, 297 Ga. App. 785, 678 S.E.2d 190 (2009), cert. denied, No. S09C1542, 2010 Ga. LEXIS 127 (Ga. 2010).

**Probation revocation.** — The notice given to a defendant that the defendant violated probation by committing robbery was sufficient notice that the defendant violated probation by committing the lesser included offense of theft by taking based on the same facts; under these circumstances, the defendant could not reasonably contend for due process purposes that the defendant was not aware of the grounds on which revocation was sought or that the defendant's ability to prepare a defense was compromised. *Franklin v. State*, 286 Ga. App. 288, 648 S.E.2d 746 (2007).

**Preservation for review.** — When a due process issue a defendant raised on appeal was not raised in the trial court, the claim presented nothing for appellate review. *Franklin v. State*, 286 Ga. App. 288, 648 S.E.2d 746 (2007).

**Applying four-part Barker speedy trial test.** — While the trial court was authorized to conclude that the "lead officer" in the prosecution against the defendant was a material and necessary witness who was unavailable for 14 months

while the defendant's case was pending, and thus a continuance during said period was proper under O.C.G.A. § 17-8-31, despite the fact that no explanation was given for the remainder of the delay, given that the defendant failed to prove any of the other *Barker v. Wingo* factors in determining whether a speedy trial violation occurred, the defendant's motion to dismiss the indictment on speedy trial grounds was properly denied. *Bell v. State*, 287 Ga. App. 300, 651 S.E.2d 218 (2007), cert. denied, No. S08C0031, 2007 Ga. LEXIS 811 (Ga. 2007).

Defendant's speedy trial right under the Sixth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) was not violated when the defendant was arrested in 1998, indicted in 1999, and tried in 2004. Part of the delay was caused by the defendant's mistaken release; defense counsel shared responsibility for the delay; the defendant had not asserted the right to a speedy trial until the day before the commencement of the defendant's first trial; there was no oppressive pretrial incarceration because the defendant had been incarcerated for only four or five months; and the death of a witness was not prejudicial because the witness's identification of a person fleeing the crime scene as someone other than the defendant did not preclude the possibility that the defendant was the other person seen running from the scene and because counsel evidently regarded the deceased witness's observations as harmful to the defense. *Smith v. State*, 284 Ga. 17, 663 S.E.2d 142 (2008).

Trial court erred in denying a defendant's motion to dismiss an indictment since there was a four-year delay between the defendant's arrest and the trial court's denial of the defendant's speedy trial motion, and the trial court failed to address the reason for the lengthy delay and failed to make even a bare conclusion about how the *Barker* factors balanced against each other. *Watkins v. State*, 315 Ga. App. 708, 727 S.E.2d 539 (2012).

**Where representation by counsel comports with due process.** — Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor

prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. *Hampton v. State*, 282 Ga. 490, 651 S.E.2d 698 (2007).

**Failure to object to exclusion of defendant's parents during child victim's testimony.** — Because the defendant failed to object to the exclusion of the defendant's parents from the courtroom, and the failure did not amount to plain error, the appeals court rejected the defendant's contentions on appeal that O.C.G.A. § 17-8-54 was violated, as was the defendant's right to public trial; moreover, the appeals court declined to extend the plain error doctrine to the instant facts. *Delgado v. State*, 287 Ga. App. 273, 651 S.E.2d 201 (2007).

**Valid waiver of trial by jury.** — Because the state presented sufficient extrinsic evidence showing that the defendant knowingly and voluntarily waived a jury trial, even though this evidence conflicted with the defendant's later testimony at the hearing on the motion for a new trial, the trial court did not err in denying the defendant a new trial. *Davis v. State*, 287 Ga. App. 783, 653 S.E.2d 107 (2007).

**Retrial did not violate due process.** — Retrial on child molestation charge did not violate due process, given the legislature's clear intention to prosecute sexual intercourse only as statutory rape. *Maynard v. State*, 290 Ga. App. 403, 659 S.E.2d 831 (2008).

**Admission of defendant's taped telephone conversation not improper.** — Admission of the defendant's secretly-taped telephone conversation with a coconspirator did not violate due process guarantees; the elicitation of the

defendant's unguarded response to a perceived confidante regarding the circumstances of the crimes in which they had both participated was clearly designed to procure an unfiltered, genuine statement from the defendant. Further, absent any evidence that the police investigative techniques were designed to induce the slightest hope of benefit or fear of injury, the resulting statements were not rendered involuntary. *Thorpe v. State*, 285 Ga. 604, 678 S.E.2d 913 (2009).

**Presumption of vindictiveness did not apply to sentence.** — When the defendant was convicted of aggravated assault, burglary, theft by taking, and carrying a concealed weapon, the trial court properly imposed a 111 year sentence of imprisonment, which was within the statutory limits and which was the maximum possible. The presumption of vindictiveness was absent when a trial court imposed a greater penalty after trial than the court would have after a guilty plea; furthermore, the trial court explained that the court imposed the sentence because the defendant's actions were life-threatening, because the jury convicted the defendant of entering the dwelling with intent to commit murder, because the defendant's actions against one victim, the defendant's parent, had escalated from the defendant's previous misdemeanor crimes against the parent, and because the defendant displayed no remorse. *Townes v. State*, 298 Ga. App. 185, 679 S.E.2d 772 (2009).

**No due process violation with delay in indictment and arrest.** — Superior court did not err in failing to dismiss the indictment on the ground that the delay in the defendant's arrest and indictment violated the defendant's rights to due process under the Fifth and Fourteenth Amendments and Ga. Const. 1983, Art. I, Sec. I, Para. I, because neither actual prejudice nor deliberate adverse action on the part of the state had been shown; the defendant was not in custody during the period in question. *Higgenbottom v. State*, 290 Ga. 198, 719 S.E.2d 482 (2011).

## RESEARCH REFERENCES

**ALR.** — Voluntary nature of confession as affected by appeal to religious beliefs, 20 ALR6th 479.

Failure of state prosecutor to disclose exculpatory tape recorded evidence as violating due process, 24 ALR6th 1.

What constitutes “custodial interrogation” at hospital by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — suspect injured or taken ill, 25 ALR6th 379.

What constitutes “custodial interrogation” of juvenile by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at police station or sheriff’s office, 26 ALR6th 451.

Application of stigma — plus due process claims to education context, 41 ALR6th 391.

Construction and application of consent-once-removed doctrine, permitting warrantless entry into residence by law enforcement officers for purposes of effectuating arrest or search where confidential informant or undercover officer enters with consent and observes criminal activity or contraband in plain view, 50 ALR6th 1.

Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — weapons, 53 ALR6th 81.

Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — personal items other than weapons, 55 ALR6th 391.

## Paragraph II. Protection to person and property; equal protection.

**Law reviews.** — For article, “Wheel of Fortune: A Critique of the ‘Manifest Imbalance’ Requirement for Race-Conscious

Affirmative Action under Title VII,” see 43 Ga. L. Rev. 993 (2009).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION

EQUAL PROTECTION

CLASSIFICATION

ZONING

TAXATION

### General Consideration

**This paragraph is a safeguard against the dangers of arbitrary power.**

Pro se litigant sued government and court officials alleging Georgia’s alimony provisions, O.C.G.A. § 19-6-1 et seq., violated (1) the right to privacy, protections of the equal protection clause, and prohibitions against involuntary servitude, as contained in the U.S. Constitution; and (2) the right to privacy, due process provisions, equal protection provisions, privileges and immunities clause, prohibitions on involuntary servitude, and prohibi-

tions against legislation based on social status, as guaranteed by the Georgia Constitution. However, the federal court determined that plaintiff must raise these constitutional challenges as part of the litigant’s state divorce proceedings, and, furthermore, that Georgia had an important state interest in enforcing these provisions. *Cormier v. Green*, 2005 U.S. App. LEXIS 14034 (11th Cir. July 12, 2005) (Unpublished).

**Behavior prescribed by O.C.G.A. § 17-10-30(b) did not involve fundamental right.** — Defendants equal protection challenge under U.S. Const., amend. XIV and Ga. Const. 1983, Art. I,

Sec. I, Para. II failed since the defendants were similarly situated to the defendants against whom the state sought the death penalty under one or more of the statutory aggravating circumstances as provided in O.C.G.A. § 17-10-30(b). The trial court did not err in refusing to apply strict scrutiny analysis in considering the defendants' equal protection challenge on the basis that the punishment prescribed by the criminal statute involves an interference with a fundamental right. The proper inquiry was whether the behavior involved a fundamental right, and the obvious answer was that the behavior did not. *Fair v. State*, 288 Ga. 244, 702 S.E.2d 420 (2010).

**Cited in** *Golden v. State*, 299 Ga. App. 407, 683 S.E.2d 618 (2009); *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683, 733 S.E.2d 269 (2012).

### Equal Protection

**Party claiming equal protection violation must be similarly situated.** — Landowners were not similarly situated to their neighbors, who had sought and received a permit and license to build a dock in a coastal marshland area, and the landowners failed to show that they would not have been able to build a dock had they so chosen. Therefore, the landowners' equal protection claim arising out of the issuance of the license to their neighbors failed. *Hitch v. Vasarhelyi*, 302 Ga. App. 381, 691 S.E.2d 286 (2010).

**Number of peremptory challenges afforded codefendants not violative of equal protection.** — O.C.G.A. § 17-8-4(b), which allows defendants tried jointly 14 peremptory challenges (while O.C.G.A. § 15-12-165 allows a defendant tried alone nine such challenges) does not violate equal protection as there are valid reasons for discriminating between the peremptory challenges of single defendants and codefendants: the avoidance of undue delay and a needless burden on the public. *Dixon v. State*, 285 Ga. 312, 677 S.E.2d 76 (2009), overruled on other grounds, 287 Ga. 242, 695 S.E.2d 255 (2010).

**Exclusion of one witness pursuant to rule of sequestration did not violate equal protection.** — Application of

the rule of sequestration to exclude a single witness, the defendant's father, from trial, while allowing the victim's mother to attend the proceedings, notwithstanding that the mother was a witness at trial, did not violate the guarantee of equal protection. *Nicely v. State*, 291 Ga. 788, 733 S.E.2d 715 (2012).

**O.C.G.A. § 46-3-204 is constitutional.** — One-year statute of limitations under O.C.G.A. § 46-3-204 is constitutional because the statute does not violate the Equal Protection Clause of the Georgia Constitution and is not unconstitutionally vague. *Daniel v. Amicalola Elec. Mbrshp. Corp.*, 289 Ga. 437, 711 S.E.2d 709 (2011).

**Use of direct recording electronic equipment does not deny equal protection.** — Trial court did not err in granting the Secretary of State, the Governor, and the Georgia State Election Board summary judgment in voters' action challenging the use of direct recording electronic equipment on the ground that it denied the voters equal protection under the equal protection clause of the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. II because all Georgia voters had the option of casting an absentee ballot or using the touch screen electronic voting machines on election day, and in deciding to forego the privilege of voting early on a paper ballot, voters assumed the risk of necessarily different procedures if a recount was required; since every Georgia citizen could vote by absentee ballot or by utilizing the touch screen voting system, the voters' contention that there was some state based classification between voters was false. *Favorito v. Handel*, 285 Ga. 795, 684 S.E.2d 257 (2009).

**Redistricting attempts for school board members.** — While voting rights and the right to run for public office are core constitutional rights, an attempted deprivation of constitutional or statutory rights is not the same as an actual deprivation. Furthermore, incurring legal fees to vindicate rights does not itself establish that those rights were violated. Thus, plaintiff, a school board member, pursuing attempted violations of plaintiff's right to run and hold a designated seat in a pre-

defined district, could not succeed as an injunction in another lawsuit and failure of preclearance interfered with the implementation of the efforts of defendants, the local voting registrars; since the attempt to deprive plaintiff of plaintiff's constitutional rights did not succeed, neither can plaintiff's lawsuit succeed. *Cook v. Randolph County*, 573 F.3d 1143 (11th Cir. 2009).

**Photo identification requirement.** — In an action by a political party challenging the 2006 Photo ID Act, amending O.C.G.A. § 21-2-417, the photo ID requirement was not an impermissible qualification on voting in violation of Ga. Const. 1983, Art. I, Sec. I, Para. II because the Act did not deprive any Georgia voter from casting a ballot in any election. *Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 707 S.E.2d 67 (2011).

#### **Jury pool.**

A defendant's Batson challenge was properly denied. The prosecutor stated that one juror had an incarcerated relative, and although the defendant showed that the juror stated that the relationship was not close, the trial court had to decide the credibility of the race-neutral explanation. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

When the prosecutor struck a juror because the prosecutor thought that the juror as an immigrant might apply an improper standard of proof, the trial court properly denied the defendant's Batson challenge. Batson did not extend to national origin; moreover, the prosecutor's other reason for striking the juror, that the juror's child had been charged with a crime, was race-neutral. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

Trial counsel was not ineffective for not using the word "pretextual" in making Batson challenges. Although counsel did not use the word "pretextual," counsel sought to rebut the prosecutor's explanations by arguing either that the strike was not race-neutral or that, considering the totality of the jury's responses to questions on voir dire examination, there was no factual basis for the strike. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

#### **Use of peremptory strikes to exclude minorities.**

While defendant made out prima facie case of racial discrimination regarding state's use of three peremptory strikes, because sufficient race-neutral reasons existed for said strikes, defendant's rights were not violated. *LeMon v. State*, 290 Ga. App. 527, 660 S.E.2d 11 (2008).

**Use of peremptory strikes to exclude minorities and females.** — Claim by a defendant, an African-American woman, that the prosecutor violated Batson by striking potential jurors based on race and gender, failed. The prosecutor's explanations for the strikes were race and gender neutral because the strikes were not based on a characteristic that was peculiar to any race or on a stereotypical belief, the reasons proffered were specific and related to the case, and three African-Americans and seven women were chosen to serve on the jury. *McKenzie v. State*, 294 Ga. App. 376, 670 S.E.2d 158 (2008).

**Death penalty statutes not racially discriminatory.** — Petitioner, a death row inmate, challenged the imposition of the death penalty in a federal habeas petition, arguing that the death penalty was being administered in a racially discriminatory manner; however, the argument failed because the statistical evidence was not so strong as to permit no inference other than that the results were the product of a racially discriminatory intent or purpose in that the death penalty was sought in 58 percent of the possible death penalty cases where the defendant was black but in only 40 percent of the cases where the defendant was white, and sought in only 25 percent of the cases where the victim was black and 54 percent of the cases where the victim was white. *Jefferson v. Terry*, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), *aff'd in part and rev'd in part*, 570 F.3d 1283 (11th Cir. Ga. 2009).

**O.C.G.A. § 17-10-30(b) bears a rational relationship to legitimate state purpose.** — O.C.G.A. § 17-10-30(b)(8) bears a rational relationship to the legitimate state purposes of providing deterrence of possible harm to peace officers and, thus, of protecting officers. Accordingly, the statutory aggravating circum-

stance does not violate equal protection under U.S. Const., amend. XIV or Ga. Const. 1983, Art. I, Sec. I, Para. II. *Fair v. State*, 288 Ga. 244, 702 S.E.2d 420 (2010).

**Grant of official immunity to state employee providing medical services.**

— Grant of official immunity from a malpractice suit to a state-employed doctor based on the patient's status as a Medicaid patient did not violate the constitutional rights of the patient's parents, as the due process and equal protection clauses of the U.S. and Georgia Constitutions protected only rights, and a waiver of sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., was merely a privilege. *Porter v. Guill*, 298 Ga. App. 782, 681 S.E.2d 230 (2009).

**Sentencing juvenile as adult.** — Juvenile defendant was tried in superior court for murder and conspiracy to commit armed robbery, but was convicted only of the latter charge. The superior court's decision to sentence the defendant as an adult under O.C.G.A. § 15-11-28(b)(2)(A)(i) did not violate the defendant's due process or equal protection rights as the defendant had no constitutional right to be treated as a juvenile. *Pascarella v. State*, 294 Ga. App. 414, 669 S.E.2d 216 (2008), cert. denied, No. S09C0426, 2009 Ga. LEXIS 188 (Ga. 2009).

**Standing to challenge Medicaid reimbursement for medically necessary abortion.**

— The trial court erroneously dismissed a complaint filed by certain medical providers, alleging violations of the Georgia Constitution on privacy and equal protection grounds, and holding that the medical providers lacked third-party standing to assert a claim on behalf of their Medicaid-eligible patients, as: (1) the medical providers properly asserted an injury in fact insofar as they had a direct financial interest in obtaining state funding to reimburse them for the cost of abortion services provided to Medicaid-eligible women, and have alleged that they performed, and will continue to perform, medically necessary abortions for which they will not be reimbursed under Georgia's Medicaid program; and (2) the relationship between

the medical providers and their patients made them uniquely qualified to litigate the constitutionality of the state's action interfering with a woman's decision to terminate a pregnancy. *Feminist Women's Health Ctr. v. Burgess*, 282 Ga. 433, 651 S.E.2d 36 (2007).

**The statute of repose for medical malpractice claims, etc.**

The statute of repose for medical malpractice suits under O.C.G.A. § 9-3-71(b) did not violate the equal protection clauses of the federal or Georgia Constitutions. There was a rational basis for treating medical malpractice differently from other forms of professional malpractice and for the five-year repose period itself, based on the considerations that uncertainty over the causes of illness and injury made it difficult for insurers to adequately assess premiums and that the passage of time made it more difficult to determine the cause of injury. *Nichols v. Gross*, 282 Ga. 811, 653 S.E.2d 747 (2007).

**Exclusion from drug court program did not violate equal protection.**

— Defendant was not admitted into a drug court program under O.C.G.A. § 16-13-2(a) not because of the defendant's HIV status, but because the defendant had a mental illness, was under a doctor's supervision, and was taking four prescription medications. As the state's interest in preserving the defendant's health was rationally related to the state's decision to exclude the defendant from the program, there was no equal protection violation. *Evans v. State*, 293 Ga. App. 371, 667 S.E.2d 183 (2008).

**Action for termination of parental rights.**

— By not raising the issue below, a mother in a termination of parental rights case waived her arguments that the trial court violated equal protection and due process by not determining whether her mental health concerns affected her ability to complete the specific goals in her case plan; moreover, there was uncontradicted evidence that despite her mental health problems, the mother understood the case plan, appreciated its requirements, and could have completed it, but did not do so, and the mother testified that she was able both physically and mentally to care for the child. In the Interest of

H.M., 287 Ga. App. 418, 651 S.E.2d 527 (2007).

**Parents required to pay part of costs of case plan in deprivation.** — In a deprivation proceeding, the department of family and child services did not violate equal protection by requiring the parents to pay part of the costs for services mandated under their case plan. The department was not drawing a distinction between similarly situated parties in that a parent who could afford to contribute financially was not similarly situated to one who could not afford to do so; moreover, even if the parents were similarly situated to others who were not required to pay for a portion of services, the goals served by the contribution requirement of calling for parents to take responsibility for conduct that harmed their children and of increasing the likelihood of success for family reunification represented legitimate governmental purposes. In the Interest of P.N., 291 Ga. App. 512, 662 S.E.2d 287 (2008).

**Education.**

The mere fact that a defendant who pled guilty was treated differently than one who was convicted after trial did not violate the equal protection clause because the defendants were not similarly situated; thus, the defendant's equal protection claim, based on the rule requiring that a motion to withdraw a guilty plea be filed in the same term as that in which the defendant was sentenced, failed. *Smith v. State*, 283 Ga. 376, 659 S.E.2d 380 (2008).

**O.C.G.A. § 42-1-12, pertaining to registration of convicted sex offenders, does not violate the concept of equal protection under the law.** — Trial court did not err in revoking a convicted sexual offender's probation for failing to register an address change after the offender moved into a motel because the offender failed to establish that the offender was treated differently from a similarly situated nonresident sexual offender entering the state; if O.C.G.A. § 42-1-12(e)(7) applies to a hypothetical nonresident sexual offender, that person must update his or her information within 72 hours of a change of address as required in § 42-1-12(f)(5), and any nonresident sexual offender who is required to

register by virtue of the specification of § 42-1-12(e)(7) is equally subject to the requirement that he or she register a new address within 72 hours of changing that address and equally subject to being charged with a violation. *Dunn v. State*, 286 Ga. 238, 686 S.E.2d 772 (2009).

**Age classification in criminal statute of limitation tolling provision.** — Supreme Court of Georgia holds that the age classification chosen in the tolling statute of O.C.G.A. § 17-3-2.2 does not violate the Equal Protection clauses of Ga. Const. 1983, Art. I, Sec. 1, Para. II, and U.S. Const., amend. XIV. *Harper v. State*, 292 Ga. 557, 738 S.E.2d 584 (2013).

**Classification**

**Reasonable classification permitted.**

Because the legislative purpose of O.C.G.A. § 51-1-29.5(c) is legitimate, and the classification drawn has some reasonable relation to furthering that purpose, the classification passes constitutional muster, and, although § 51-1-29.5(c) raises the burden of proof in certain cases, it does not deprive one of the right to a jury trial or any other fundamental right. Promoting affordable liability insurance for health care providers and hospitals, and thereby promoting the availability of quality health care services, are legitimate legislative purposes, and it is entirely logical to assume that emergency medical care provided in hospital emergency rooms is different from medical care provided in other settings and that establishing a standard of care and a burden of proof that reduces the potential liability of the providers of such care will help achieve those legitimate legislative goals. *Gliemmo v. Cousineau*, 287 Ga. 7, 694 S.E.2d 75 (2010).

**DUI cases ineligible for first offender treatment.** — O.C.G.A. § 40-6-391(f) did not violate equal protection under the Fourteenth Amendment or Ga. Const. 1983, Art. I, Sec. I, Para. II by excluding driving-under-the-influence offenses from First Offender Act, O.C.G.A. § 42-8-60 et seq., coverage. The defendant did not show the absence of a rational relationship between the state's compelling interest in protecting the public's

safety and the classification; the defendant’s equal protection argument boiled down to no more than the claim that the legislature made a bad policy judgment about which offenders should be eligible for First Offender Act treatment. *Rhodes v. State*, 283 Ga. 361, 659 S.E.2d 370 (2008).

**Zoning**

**Ordinance banning permit applications if two or more ordinance violations existed.** — In a declaratory judgment action brought by a developer against a county seeking to invalidate an ordinance which required denial of the developer’s land disturbance permit based on two soil-related ordinance violations existing, the judgment in favor of the developer was upheld on appeal with regard to the developer’s claim for damages under 42 U.S.C. § 1983, for alleged violations of the developer’s equal protection rights in the county’s enforcement of the ordinance. The trial court properly determined that the developer was not required to prove a valid property right with regard to the developer’s equal protection challenge; the trial court properly awarded attorney fees to the developer under

O.C.G.A. § 13-6-11 as the jury was authorized to award the attorney fees as an element of the damages it awarded on the developer’s federal equal protection claim, regardless of whether the developer could prevail on any state law claim for damages; but the trial court erred by failing to address the merits of the developer’s petition for a declaratory judgment since the overall enforceability of the ordinance, which was still the law, was not rendered moot by the withdrawal notice. *Fulton County v. Legacy Inv. Group, LLC*, 296 Ga. App. 822, 676 S.E.2d 388 (2009).

**Taxation**

**County homestead tax exemptions did not violate equal protection.** — County homestead exemptions from ad valorem and education taxes did not violate due process or equal protection because they were rationally related to the legitimate government interests of the encouragement of neighborhood preservation, continuity, and stability, and the protection of reliance interest of existing homeowners, and the limits placed on the exemptions were not arbitrary. *Blevins v. Dade County Bd. of Tax Assessors*, 288 Ga. 113, 702 S.E.2d 145 (2010).

**RESEARCH REFERENCES**

**ALR.** — Class-of-one equal protection claims based upon real estate develop-

ment, zoning, and planning, 68 ALR6th 229.

**Paragraph III. Freedom of conscience.**

**Law reviews.** — For comment, “I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious

Objectors to Same-Sex Relationships,” see 59 Emory L.J. 259 (2009).

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**Cited in** *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683, 733 S.E.2d 269 (2012).

**Paragraph IV. Religious opinions; freedom of religion.**

**Cross references.** — Adult’s reliance on prayer or religious nonmedical means of treatment of dependent, § 15-11-107.

**Law reviews.** — For article, “Religious Symbols on Government Property: Lift High the Cross? Contrasting the New Eu-

ropean and American Cases on Religious Symbols on Government Property,” see 25 Emory Int’l L. Rev. 5 (2011).

For comment, “I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex

Relationships,” see 59 Emory L.J. 259 (2009). For comment, “For God and Money: The Place of the Megachurch Within the Bankruptcy Code,” see 27 Emory Bankr. Dev. J. 609 (2011).

## JUDICIAL DECISIONS

**Trial court did not involve itself in ecclesiastical matters in church property dispute case.** — A trial court did not violate the principle of separation of church and state by exercising jurisdiction in a civil case brought by a church and its board of deacons against the pastor and others to have the pastor removed and to have the pastor relinquish control of the church’s property because the trial court did not involve itself in ecclesiastical

matters when it ordered that persons eligible to vote on whether to retain or discharge the pastor were limited to those in membership with the church under the church’s existing bylaws. Further, because the petition in the case involved a dispute over the control of church property, it presented a civil matter over which the trial court had jurisdiction. *Smith v. Mount Salem Missionary Baptist Church*, 289 Ga. App. 578, 657 S.E.2d 642 (2008).

## RESEARCH REFERENCES

**ALR.** — Wearing of religious symbols in courtroom as protected by first amendment, 18 ALR6th 775.

State constitutional challenges to the display of religious symbols on public property, 26 ALR6th 145.

Constitutionality of legislative prayer practices, 30 ALR6th 459.

Application of First Amendment’s “ministerial exception” or “ecclesiastical exception” to state civil rights claims, 53 ALR6th 569.

When does use of pepper spray, mace, or other similar chemical irritants constitute violation of constitutional rights, 65 ALR6th 93.

Prohibition of federal agency’s keeping of records on methods of individual exercise of First Amendment rights, under Privacy Act of 1974 (5 U.S.C.S. § 552a(e)(7)), 20 ALR Fed. 2d 437.

Ineffective assistance of counsel in removal proceedings — Particular acts, 59 ALR Fed. 2d 151.

## Paragraph V. Freedom of speech and of the press guaranteed.

**Law reviews.** — For article, “I’m Not Gay, M’Kay?: Should Falsely Calling Someone a Homosexual be Defamatory?,” see 44 Ga. L. Rev. 739 (2010). For article, “Bullying in Public Schools: The Intersection Between the Student’s Free Speech Rights and the School’s Duty to Protect,” see 62 Mercer L. Rev. 407 (2011). For annual survey on local government law, see 64 Mercer L. Rev. 213 (2012).

For note, “A Bridge Too Far? Directive 1344.10 and the Military’s Inroads on

Core Political Speech in Campaign Media,” see 44 Ga. L. Rev. 837 (2010).

For comment, “You’ve Got Libel: How the Can-Spam Act Delivers Defamation Liability to Spam-Fighters and Why the First Amendment Should Delete the Problem,” see 58 Emory L.J. 1013 (2009). For comment, “Room for Error Online: Revising Georgia’s Retraction Statute to Accommodate the Rise of Internet Media,” see 28 Ga. St. U.L. Rev. 923 (2012).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### FREEDOM OF THE PRESS

#### APPLICATION

1. IN GENERAL
2. CRIMINAL MATTERS
3. SIGN ORDINANCES

### General Consideration

**Cited in** 10950 Retail, LLC v. City of Johns Creek, 299 Ga. App. 458, 682 S.E.2d 637 (2009); DeLong v. State, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

### Freedom of the Press

#### Liberty of the press balanced against right to privacy.

Publishing 20-year-old nude photos of an aspiring model who later became a professional wrestler and whose murder was highly publicized did not fall within Georgia's right of publicity newsworthiness exception; the photos were unrelated to the incident of public concern, the model's death, and thus, a right of publicity case filed by plaintiff, the mother and personal representative for the model's estate, against defendant publisher, could be pursued; under the First Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. V, every private fact disclosed in an otherwise truthful, newsworthy publication had to have some substantial relevance to a matter of legitimate public interest in order to fall within the newsworthiness exception. *Toffoloni v. LFB Publ'g Group*, 572 F.3d 1201 (11th Cir. 2009), cert. denied, mot. granted, 130 S. Ct. 1689, 176 L. Ed. 2d 206 (2010).

**Plaintiff failed to prove newspaper acted with actual malice.** — Former police officer sued a newspaper for libel based on a letter to the editor the newspaper printed. As a public figure, the officer had to establish actual malice on the part of the newspaper under O.C.G.A. § 51-5-7(9) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), but failed to do so because the statements at issue were opinions that were not susceptible of being proved true or false. *Evans v. Sandersville Georgian, Inc.*, 296 Ga. App. 666, 675 S.E.2d 574 (2009).

### Application

#### 1. In General

**Constitutionality of false statement statute.** — False statement statute, O.C.G.A. § 16-10-20, when properly construed to require that the defendant make the false statement with knowledge and intent that the statement may come within the jurisdiction of a state or local government agency, is constitutional because correctly interpreted, the statute raises no substantial constitutional concern on the statute's face; the statute requires a defendant to know and intend, that is, to contemplate or expect, that his or her false statement will come to the attention of a state or local department or agency with the authority to act on the statement, and as properly construed, O.C.G.A. § 16-10-20 may only be applied to conduct that persons of common intelligence would know was wrongful because the statement could result in harm to the government. *Haley v. State*, 289 Ga. 515, 712 S.E.2d 838 (2011), cert. denied, U.S. , 133 S. Ct. 60, 183 L. Ed. 2d 711 (2012).

**Ordinance regulating the volume of noise upheld.** — Local ordinance regulating the volume of noise from mechanical sound-making devices, Athens-Clarke County, Ga. Ordinance § 3-5-24(c)(2)(a), did not violate Ga. Const. 1983, Art. I, Sec. I, Para. V since the ordinance served a significant government interest in protecting both the community in general and individual citizens from noises which could have affected their comfort, repose, health, or safety, the provision left open ample alternatives for expression, and the ordinance was the least restrictive means of promoting the county's significant interest in protecting the comfort and repose of the county's citizens. *Grady v. Unified*

Gov't of Athens-Clarke County, 289 Ga. 726, 715 S.E.2d 148 (2011).

**Vagueness finding reversed where party lacked standing to challenge constitutionality of county zoning provision.** — Because a lessor and a lessee did not preserve an “as applied” challenge to two county zoning code provisions, did not seek a special use permit, and lacked standing to make a constitutional challenge, the trial court erred in finding the provisions unconstitutionally vague, regardless of whether they had an otherwise viable facial challenge. *Catoosa County v. R.N. Talley Props., LLC*, 282 Ga. 373, 651 S.E.2d 7 (2007).

**Content-neutral regulation that incidentally affected protected expression should not have been analyzed using rational basis test.** — When a night club asserted violations of the club’s free speech rights under Ga. Const. 1983, Art. I, Sec. I, Para. V, the trial court erred in applying the rational basis test in denying the night club’s petition for an interlocutory injunction. The challenged content-neutral amendments to county ordinances, which provided that one hour after the end of the legal period for selling alcoholic beverages, a business must be cleared of customers, close, and not reopen until 9:00 a.m., should have been analyzed using the appropriate legal standard: whether the regulation furthered an important government interest, whether the government interest was unrelated to the suppression of speech, and whether the incidental restriction of speech was no greater than was essential to the furtherance of that interest. *Great Am. Dream, Inc. v. DeKalb County*, 290 Ga. 749, 727 S.E.2d 667 (2012).

## 2. Criminal Matters

**Constitutionality of Georgia Street Gang Terrorism and Prevention Act.** — Trial court properly denied the appellants’ motion to dismiss various counts charging the appellants with gang-related crimes under the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., since properly construed O.C.G.A. § 16-15-4(a) did not directly or indirectly infringe upon the First Amendment right to freedom of association as, to

support a conviction, gang conduct or participation was required. Further, reading of § 16-15-4(a) according to the natural and obvious import of the statute’s language and in conjunction with the specific definitions in O.C.G.A. § 16-15-3, the statute provided a sufficiently definite warning to persons of ordinary intelligence of the prohibited conduct and was not susceptible to arbitrary and discriminatory enforcement and did not reach a substantial amount of constitutionally protected conduct, thus, the statute was not unconstitutionally vague or overbroad. *Rodriguez v. State*, 284 Ga. 803, 671 S.E.2d 497 (2009).

**O.C.G.A. § 16-5-5(b) is unconstitutional** under the free speech provisions of the United States and Georgia Constitutions, U.S. Const., amend. 1 and Ga. Const. 1983, Art. I, Sec. I, Para. V, because it is not all assisted suicides that are criminalized but only those that include a public advertisement or offer to assist; because the state failed to provide any explanation or evidence as to why a public advertisement or offer to assist in an otherwise legal activity was sufficiently problematic to justify an intrusion on protected speech rights, it could not, consistent with the United States and Georgia Constitutions, make the public advertisement or offer to assist in a suicide a criminal offense. *Final Exit Network, Inc. v. State*, 290 Ga. 508, 722 S.E.2d 722 (2012).

## 3. Sign Ordinances

### City sign ordinance, etc.

Trial court properly granted summary judgment to a city in a suit brought by an outdoor sign company challenging the constitutionality of the city’s sign ordinance as the company’s sign applications failed to meet the city’s height and size restrictions and the restrictions were constitutional. Since the company lacked standing to challenge any other provision of the ordinance, the trial court should not have addressed the company’s constitutional arguments concerning other provisions of the ordinance, though that appellate court determination did not change the grant of summary judgment to the city. *Granite State Outdoor Adver., Inc. v.*

City of Roswell, 283 Ga. 417, 658 S.E.2d 587 (2008), cert. denied, 129 S. Ct. 222, 172 L.Ed.2d 143 (2008).

**Standing to object to city ordinance.** — In a corporation's suit alleging that a city's denial of the corporation's variance applications under the September 20, 1983, Cumming, Georgia zoning ordinance, as amended on June 20, 2006, violated Ga. Const. 1983, Art. I, Sec. 1, Para. V, the corporation lacked standing to assert the corporation's claims regarding the actual denial of the variances; those claims were not redressible because the corporation did not challenge the height or spacing requirements upon which the denials were predicated. However, the corporation had standing to assert the corporation's claims regarding the city's long delay in processing the applications because such injury was redressible. *Roma Outdoor Creations, Inc. v. City of Cumming*, 599 F. Supp. 2d 1332 (N.D. Ga. 2009).

**County sign ordinance.** — A county ordinance which prohibited off-premise signs in commercially-zoned areas, including all commercial signs, and then permitted the county to decide on a case-by-case basis which signs were allowed, violated

the First Amendment. By initially declaring all signs as illegal and allowing the county to exempt from the ban only on a case-by-case basis, the ordinance was more extensive than was necessary to protect against misleading commercial speech and provided insufficient protection for protected speech, both commercial and otherwise. *Fulton County v. Galberaith*, 282 Ga. 314, 647 S.E.2d 24 (2007).

**Sign ordinance's content based restrictions were invalid.** — Corporation was successful in the corporation's suit alleging that a city's denial of the corporation's variance applications under the September 20, 1983, Cumming, Georgia zoning ordinance, as amended on June 20, 2006, violated Ga. Const. 1983, Art. I, Sec. 1, Para. V since the ordinance, which limited billboard content to travel services and attractions, was unconstitutional on the ordinance's face because the ordinance was a prior restraint that was content-based and lacked time limits, and the city's delay of more than 150 days in processing the corporation's billboard variance applications violated the corporation's rights. *Roma Outdoor Creations, Inc. v. City of Cumming*, 599 F. Supp. 2d 1332 (N.D. Ga. 2009).

## RESEARCH REFERENCES

**ALR.** — Construction and application of federal and state constitutional and statutory speech or debate provisions, 24 ALR6th 255.

Constitutional challenges to compelled speech — General principles, 72 ALR6th 513.

Amendment protection afforded to web site operators, 30 ALR6th 299.

First Amendment protection afforded to blogs and bloggers, 35 ALR6th 407.

Validity of restrictions imposed during national political conventions impinging upon rights to freedom of speech and assembly under First Amendment, 46 ALR6th 465.

Restrictive covenants or homeowners' association regulations restricting or prohibiting flags, signage, or the like on homeowner's property as restraint on free speech, 51 ALR6th 533.

When does use of pepper spray, mace, or

other similar chemical irritants constitute violation of constitutional rights, 65 ALR6th 93.

Construction and application of Supreme Court's holding in *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 175 L. Ed. 2d 753, 187 L.R.R.M. (BNA) 2961, 159 Lab. Cas. (CCH) P 10166 (2010), that government may not prohibit independent and indirect corporate expenditures on political speech, 65 ALR6th 503.

Constitutionality of restricting public speech in street, sidewalk, park, or other public forum — Characteristics of forum, 70 ALR6th 513.

Constitutionality of restricting public speech in street, sidewalk, park, or other public forum — Manner of restriction, 71 ALR6th 471.

Constitutional challenges to compelled speech — Particular situations or circumstances, 73 ALR6th 281.

Construction and application of establishment clause of First Amendment — U.S. Supreme Court cases, 15 ALR Fed. 2d 573.

First Amendment protection for members of military subjected to discharge, transfer, or discipline because of speech, 40 ALR Fed. 2d 229.

Application of First Amendment’s “ministerial exception” or “ecclesiastical exception” to federal civil rights claims, 41 ALR Fed. 2d 445.

Application of First Amendment in school context — Supreme Court cases, 57 ALR Fed. 2d 1.

Paragraph VI. Libel.

**Law reviews.** — For comment, “You’ve Got Libel: How the Can-Spam Act Delivers Defamation Liability to

Spam-Fighters and Why the First Amendment Should Delete the Problem,” see 58 Emory L.J. 1013 (2009).

Paragraph VIII. Arms, right to keep and bear.

JUDICIAL DECISIONS

**Prohibition of possessing weapons in context of visitation order.** — Trial court’s order that the parties not have any weapons in their possession when exchanging their children did not infringe on a parent’s right under Ga. Const. 1983, Art. I, Sec. I, Para. VIII to keep and bear arms as the parent’s possession of a fire-

arm was not restricted except in the context of a narrowly tailored condition of visitation justified by the evidence. Moore v. Moore-McKinney, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

**Cited** in McClure v. Kemp, 285 Ga. 801, 684 S.E.2d 255 (2009).

Paragraph IX. Right to assemble and petition.

JUDICIAL DECISIONS

**Cited** in Verdi v. Wilkinson County, 288 Ga. App. 856, 655 S.E.2d 642 (2007); Meacham v. Franklin-Heard County Wa-

ter Auth., 302 Ga. App. 69, 690 S.E.2d 186 (2009).

RESEARCH REFERENCES

**ALR.** — Validity of restrictions imposed during national political conventions impinging upon rights to freedom of speech and assembly under First Amendment, 46 ALR6th 465.

When does use of pepper spray, mace, or other similar chemical irritants constitute violation of constitutional rights, 65 ALR6th 93.

Paragraph X. Bill of attainder; ex post facto laws; and retroactive laws.

**Law reviews.** — For annual survey on local government law, see 64 Mercer L. Rev. 213 (2012).

## JUDICIAL DECISIONS

## ANALYSIS

BILL OF ATTAINDER

EX POST FACTO LAWS

RETROACTIVE LAWS

LAWS IMPAIRING OBLIGATION OF CONTRACTS

VESTED RIGHTS

**Bill of Attainder**

**Local act providing for selection of chair of board of education was unconstitutional bill of attainder.** — H.B. 563 was an unconstitutional bill of attainder under Ga. Const. 1983, Art. I, Sec. I, Para. X, as applied to the chairperson of the Randolph County Board of Education because prior to the passage of the bill, the chairperson's term was not set to expire until December 31, 2010, but the bill operated to cut short the chairperson's four-year term that had previously been established by O.C.G.A. § 20-2-57(a) and local board policy. *Cook v. Smith*, 288 Ga. 409, 705 S.E.2d 847 (2010).

**Ex Post Facto Laws**

**Amendment of forcible rape statute meant indictment within statute of limitations.** — With regard to a defendant's conviction for forcible rape of the defendant's child during the time the child was 13 through 15 years of age, the trial court correctly concluded that the state had 15 years from the victim's 16th birthday on January 12, 1995, or until January 12, 2010, to prosecute the case noting the extension of the statute of limitation to 15 years as to forcible rape by the 1996 amendment to O.C.G.A. § 17-3-1; therefore, no ex post facto violation occurred since the indictment was filed on January 8, 2008. *Duke v. State*, 298 Ga. App. 719, 681 S.E.2d 174 (2009), cert. denied, No. S09C1866, 2010 Ga. LEXIS 31 (Ga. 2010).

**Retroactive Laws****General rule regarding operation of laws.**

Because a retroactive application of O.C.G.A. § 9-11-68 would have impaired the offeror's rights to recover attorney's fees and costs, the trial court did not err in applying the statute in effect at the time

the offeror's offer was made. *Kromer v. Bechtel*, 289 Ga. App. 306, 656 S.E.2d 910 (2008).

**Retroactive application of statute of limitations held constitutional.**

Administrator's fraudulent conveyance claims against group one were time-barred under O.C.G.A. §§ 18-2-74(a)(1) and 18-2-79(1), even though the claim was not time-barred under the limitations period in effect when the claim accrued, as application of O.C.G.A. § 18-2-79, a procedural law in effect at the time the suit was filed, did not violate the constitutional prohibition against retroactive laws under Ga. Const. 1983, Art. I, Sec. I, Para. X; the administrator also failed to avail the administrator of the one-year statute of limitation effective upon discovery of the alleged fraud. *Huggins v. Powell*, 315 Ga. App. 599, 726 S.E.2d 730 (2012).

**Application to attorney fee statute.**

— O.C.G.A. § 9-11-68(b)(1) does not merely prescribe the methods of enforcing rights and obligations, but rather affects the rights of parties by imposing an additional duty and obligation to pay an opposing party's attorney fees when a final judgment does not meet a certain amount or is one of no liability; by creating this new obligation, the statute operates as a substantive law, which is unconstitutional under Ga. Const. 1983, Art. I, Sec. I, Para. X, given its retroactive effect to pending cases. *Fowler Props. v. Dowland*, 282 Ga. 76, 646 S.E.2d 197 (2007).

**No retroactive application of tolling statute by injured passenger.**

— As a vehicle passenger's claim was only two months old when the tolling provisions of O.C.G.A. § 9-3-99 became effective, and the passenger had not yet filed suit, § 9-3-99 was applicable to the action and there was no merit to a claim that it was retroactively applied in violation of Ga.

Const. 1983, Art. I, Sec. I, Para. X. *Beneke v. Parker*, 293 Ga. App. 186, 667 S.E.2d 97 (2008), *aff'd in part, rev'd in part*, 285 Ga. 733, 684 S.E.2d 243 (2009).

**Laws Impairing Obligation of Contracts**

**This paragraph forbids passage of laws which impair vested rights.**

Decision to award a limited liability company fee simple title in real property did not violate the contract impairment clauses in U.S. Const., Art. I, Sec. 10 and Ga. Const. 1983, Art. I, Sec. I, Para. X-as a corporation's rights to the property pursuant to a 1984 tax deed had not vested prior to the effective date of a 1989 amendment of O.C.G.A. § 48-4-48, which operated retrospectively. *BX Corp. v. Hickory Hill 1185, LLC*, 285 Ga. 5, 673 S.E.2d 205 (2009).

**Vested Rights**

**Prohibition against interference with vested rights and vested defenses.**

Rights of the decedent's surviving spouse were already vested when the Revised Georgia Trust Code of 2010 (Revised Code), O.C.G.A. § 53-12-1 et seq., was

enacted because under the terms of the amended trust agreement, the surviving spouse's rights to the trust assets took effect upon the decedent's death before the Revised Code took effect. Accordingly, any new obligation imposed by the Revised Code that would have impaired the surviving spouse's right to possession could not be applied retroactively. *Rose v. Waldrif*, 316 Ga. App. 812, 730 S.E.2d 529 (2012), cert. denied, No. S12C1888, 2012 Ga. LEXIS 981 (Ga. 2012).

**Vesting of rights in companies.** — Void county sign ordinance could not be used as the basis for the denial of sign companies' applications for permits to construct billboards, and the invalidity of the ordinance resulted in there being no valid restriction on the construction of billboards in the county. Accordingly, the sign companies obtained vested rights in the issuance of the permits which the companies sought and the subsequent creation of new cities within unincorporated county land and the annexation of property into one city did not divest the sign companies of the companies' vested rights. *Fulton County v. Action Outdoor Adver., JV, LLC*, 289 Ga. 347, 711 S.E.2d 682 (2011).

**Paragraph XI. Right to trial by jury; number of jurors; selection and compensation of jurors.**

**Law reviews.** — For annual survey of law on criminal law, see 62 *Mercer L. Rev.* 87 (2010). For article, "The Case Against Closure: Open Courtrooms After *Presley v. Georgia*," see 16 (No. 2) *Ga. St. B.J.* 10 (2010).

For comment, "Where Do We Go From Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia," see 28 *Ga. St. U.L. Rev.* 1341 (2012).

**JUDICIAL DECISIONS**

**ANALYSIS**

GENERAL CONSIDERATION

RIGHT TO TRIAL BY JURY

- 1. IN GENERAL
- 2. CIVIL CASES
- 3. CRIMINAL CASES

PUBLIC TRIAL BY IMPARTIAL JURY

- 1. PUBLIC TRIAL
- 2. IMPARTIAL JURY
- 3. SPEEDY TRIAL

JURORS

1. SELECTION
  2. QUALIFICATIONS
- WAIVER OF RIGHTS

### General Consideration

**Right to jury trial not violated in plea bargain.** — Defendant's right to a jury trial was not violated by illegal plea bargaining through a threatened longer sentence if the defendant proceeded to trial. *Logan v. State*, 309 Ga. App. 95, 709 S.E.2d 302, cert. denied, No. S11C1101, 2011 Ga. LEXIS 579; cert. denied, U.S. , 132 S. Ct. 823, 181 L. Ed. 2d 533 (2011).

**Cited in** *Burg v. State*, 297 Ga. App. 118, 676 S.E.2d 465 (2009).

### Right to Trial by Jury

#### 1. In General

**Private voir dire on sensitive issues.** — Defendant's right to a public trial was not violated by the trial court's conduct of certain portions of voir dire in a private jury room rather than in open court because the defendant's counsel agreed that jurors should have a private opportunity to answer questions of a sensitive nature, including jurors' attitudes toward homosexuality and jurors' prior arrests, and the right to a public trial gave way to the right for a fair trial. *State v. Abernathy*, 289 Ga. 603, 715 S.E.2d 48 (2011).

#### 2. Civil Cases

**No right to jury trial where case best handled by summary judgment.**

Trial court did not violate a purchaser's right to a jury trial under the Georgia Constitution or O.C.G.A. § 9-11-38 by granting summary judgment to a lender because the right to a jury trial was not infringed as the jury would have no role since there were no issues of material fact in dispute. *Leone v. Green Tree Servicing, LLC*, 311 Ga. App. 702, 716 S.E.2d 720 (2011).

**Statutory cap on noneconomic damages in medical malpractice cases.** — Statutory limitation of awards of noneconomic damages in medical malpractice cases to a predetermined amount

was unconstitutional because it violated the right to a jury trial guaranteed by Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), and the statute was wholly void and of no force and effect from the date of the statute's enactment. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (2010).

**Jury trial not authorized for recovery of appellate costs.** — Because O.C.G.A. § 5-6-5 was enacted in 1845, the statutory procedure for the recovery of appellate costs was unknown in 1798, the year the Georgia Constitution was enacted, and there was no right to jury trial under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a). *Mize v. First Citizens Bank & Trust Co.*, 302 Ga. App. 757, 691 S.E.2d 648 (2010).

#### 3. Criminal Cases

##### Waiver valid.

Because the state presented sufficient extrinsic evidence showing that the defendant knowingly and voluntarily waived a jury trial, even though this evidence conflicted with the defendant's later testimony at the hearing on the motion for a new trial, the trial court did not err in denying the defendant a new trial. *Davis v. State*, 287 Ga. App. 783, 653 S.E.2d 107 (2007).

**Right to public trial denied when trial held in county jail.** — Defendant was denied the right to a public trial under the Sixth Amendment of the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) when the defendant's trial was held in a county jail because the produced un rebutted evidence that jail authorities excluded from the jail courtroom the defendant's brother, a member of the public who wanted to attend the trial; the closure of the courtroom to the brother was neither brief nor trivial as the brother was kept out of the courtroom during the entire trial, which involved criminal charges brought against the defendant in regard to a family member, and the trial court, by deciding to hold the defendant's trial in a facility where

the public's access was governed exclusively by the jail authorities, failed in the court's obligation to take reasonable measures to accommodate public attendance at the trial. *Purvis v. State*, 288 Ga. 865, 708 S.E.2d 283 (2011).

**Abuse of discretion to prohibit questions on subject matter during voir dire.** — Trial court abused the court's discretion in prohibiting the defendant from asking voir dire questions of prospective jurors as to whether the jurors would automatically impose the death penalty, as opposed to fairly considering all three sentencing options (death, life without parole, and life with the possibility of parole) in a case involving the murder of young children as such questioning was permitted under O.C.G.A. § 15-12-133. *Ellington v. State*, 292 Ga. 109, 735 S.E.2d 736 (2012).

## Public Trial by Impartial Jury

### 1. Public Trial

**Judge may for any special reason exclude certain spectators from courtroom.** — The trial court did not violate O.C.G.A. § 17-8-57 by expressing to two jurors an opinion that the defendant was guilty, as the court merely sought to determine whether the two jurors should be excused from further service because of their relationship with the defendant's family and resolved the issue in the manner the defendant requested; moreover, the defendant's right to a public trial was not violated when the trial judge ordered the spectators out of the courtroom at this time, as the judge was accommodating a request of one of the jurors for a more private setting. *Berry v. State*, 282 Ga. 376, 651 S.E.2d 1 (2007).

**No error excluding spectators for lack of space.** — Trial court did not err when it indicated that spectators would need to be excluded from the courtroom during voir dire because of limited space since defendant never objected and failed to show that any spectators were barred from or sent out of the courtroom. *Martinez v. State*, 318 Ga. App. 254, 735 S.E.2d 785 (2012).

**Failure to object to exclusion of defendant's parents during child vic-**

**tim's testimony.** — Because the defendant failed to object to the exclusion of the defendant's parents from the courtroom, and the failure did not amount to plain error, the appeals court rejected the defendant's contentions on appeal that O.C.G.A. § 17-8-54 was violated, as was the defendant's right to public trial; moreover, the appeals court declined to extend the plain error doctrine to the instant facts. *Delgado v. State*, 287 Ga. App. 273, 651 S.E.2d 201 (2007).

**There was no abuse of discretion of court in exclusion of spectators during testimony, etc.**

Defendant failed to show that the trial court violated the defendant's right to a public trial after the court cleared the courtroom of nonessential personnel when the youngest victim testified because the defendant did not identify any specific people or category of people that were wrongly evicted. *Clark v. State*, 309 Ga. App. 749, 711 S.E.2d 339 (2011).

### 2. Impartial Jury

**Remark did not require entire panel to be excused.** — Even if trial counsel was ineffective for failing to challenge the jury array on the basis that the array was tainted by the comments of a juror who was excused after stating that the juror thought the defendant was "guilty in 2003," when the crimes occurred, there was no prejudice because the juror's opinion was based solely on media reports, not on any personal knowledge of the defendant; where a prospective juror's comments did not link a defendant with criminal activity, or characterize the defendant as a criminal, the entire jury panel did not have to be excused. *Edwards v. State*, 282 Ga. 259, 646 S.E.2d 663 (2007).

**State witness serving as bailiff during defendant's trial.** — Defendant's trial counsel was ineffective for failing to object to a county sheriff serving as a bailiff during the defendant's trial on charges of, inter alia, arson because the sheriff was a key witness for the state. Even if the sheriff never directly discussed the case with the jurors, the defendant was prejudiced as the sheriff continually associated with the jurors during half the

trial and, thus denied the defendant the right to a fair trial by an impartial jury. *Bass v. State*, 285 Ga. 89, 674 S.E.2d 255 (2009).

### 3. Speedy Trial

**Dead docketing a case.** — Placing a case upon the dead docket constitutes neither a dismissal nor a termination of the prosecution in the accused’s favor. Consequently, the fact that a case is placed on the dead docket does not affect the constitutional right to a speedy trial. *Hayes v. State*, 298 Ga. App. 338, 680 S.E.2d 182 (2009).

**Four factors are relevant to consideration, etc.**

Upon the appellate court’s analysis of the four *Barker v. Wingo* factors, given the negative weight of one of two factors against the state, specifically, the reason for the delay, and the defendant’s failure to show prejudice and timely assertion of a speedy trial right, no abuse of discretion resulted from the trial court’s denial of a motion to dismiss the indictments filed against the defendant on speedy trial grounds. *Simmons v. State*, 290 Ga. App. 315, 659 S.E.2d 721 (2008).

**Applying four-part Barker speedy trial test.**

While the trial court was authorized to conclude that the “lead officer” in the prosecution against the defendant was a material and necessary witness who was unavailable for 14 months while the defendant’s case was pending, and thus a continuance during said period was proper under O.C.G.A. § 17-8-31, despite the fact that no explanation was given for the remainder of the delay, given that the defendant failed to prove any of the other *Barker v. Wingo* factors in determining whether a speedy trial violation occurred, the defendant’s motion to dismiss the indictment on speedy trial grounds was properly denied. *Bell v. State*, 287 Ga. App. 300, 651 S.E.2d 218 (2007), cert. denied, No. S08C0031, 2007 Ga. LEXIS 811 (Ga. 2007).

The trial court properly rejected a defendant’s constitutional speedy trial claim; although the 18-month delay between a remittitur and the filing of the defendant’s second motion for discharge

and acquittal was presumptively prejudicial and was apparently caused by failure to schedule the case or by an overcrowded docket, the defendant had not asserted the constitutional speedy trial right until 18 months after remittitur and had not shown that witnesses were unavailable. *Oni v. State*, 285 Ga. App. 342, 646 S.E.2d 312 (2007).

The trial court did not abuse its discretion in granting the defendants’ motions to dismiss the charges filed against them because the court was authorized to find that, as the result of the state’s negligence, both the defendants were subjected to an extraordinarily long delay in being brought to trial, that they were not dilatory in asserting their right to a speedy trial, and that, as a result of the delay, their ability to defend against the belated murder charge was prejudiced. *State v. White*, 282 Ga. 859, 655 S.E.2d 575 (2008).

Trial court erred by denying defendant’s motion to dismiss the indictment for pre-indictment delay and granting defendant’s motion to dismiss for delay in prosecution because it failed to properly weigh the case law factors and improperly analyzed the defendant’s claim for pre-indictment delay as a due process violation. *State v. Curry*, 317 Ga. App. 611, 732 S.E.2d 459 (2012).

**Finding of speedy trial not supported by evidence.** — In determining a constitutional speedy trial claim, the trial court failed to account for two years of the four-year delay, and its finding that the rest of the delay was justified by an investigator’s military service was not supported by sufficient evidence as it was not clear when the investigator returned; thus, remand was required. *Fischer v. State*, 286 Ga. App. 180, 651 S.E.2d 432 (2007).

**Court did not err in denying motion to dismiss on speedy trial grounds, etc.**

A trial court did not err by denying a defendant’s motion to dismiss based on an alleged violation of the defendant’s constitutional right to a speedy trial because the various appeals by the defendant and the state constituted valid reasons for significant periods of the delay in the trial, part

of the delay was inherent since the case involved a death penalty prosecution, there was no evidence of a deliberate attempt by the state to delay the trial in order to hamper the defense, and the trial court was authorized to conclude that there had not been any impairment to the defense. *Griffin v. State*, 282 Ga. 215, 647 S.E.2d 36 (2007), overruled on other grounds, *Garza v. State*, 284 Ga. 696, 670 S.E.2d 73 (2008).

Trial court properly denied defendant's motion to dismiss the indictment against him because defendant never filed an effective statutory demand for a speedy trial and, as to defendant's constitutional right to a speedy trial, the 68-month delay was presumed prejudicial, but defendant prolonged the proceedings due to defendant's own issues with retaining counsel, including defendant's original counsel obtaining various leaves of absences due to illness and defendant's unsuccessful efforts to retain other private counsel. *Henderson v. State*, 290 Ga. App. 427, 662 S.E.2d 652 (2008).

With regard to a defendant being indicted for malice murder and other crimes, the trial court did not abuse the court's discretion by denying the defendant's motion to dismiss the indictment on speedy trial grounds as, although the delay of two years, two months, and 23 days in bringing the defendant to trial was presumptively prejudicial, the record supported the trial court's factual conclusion that the defendant failed to establish oppressive pretrial incarceration or anxiety and concern beyond that which necessarily attended confinement in a penal institution, and the defendant failed to present any specific evidence that the defendant's ability to defend had been impaired. *Ruffin v. State*, 284 Ga. 52, 663 S.E.2d 189 (2008), cert. denied, 555 U.S. 1181, 129 S.Ct. 1330, 173 L.Ed.2d 603 (2009).

That a defendant never asserted a statutory right to a speedy trial, agreed to some continuances, never objected to others, and never acted on the trial court's invitation to file an out-of-time speedy trial demand, established that the defendant did not timely and vigilantly assert the defendant's constitutional right to a speedy trial. Therefore, the defendant's

motion to dismiss on speedy trial grounds was properly denied. *Bowling v. State*, 285 Ga. 43, 673 S.E.2d 194 (2009).

Trial court did not abuse the court's discretion in denying a defendant's motion to dismiss on the basis that the state violated the defendant's right to a speedy trial pursuant to the Sixth Amendment to the Constitution of the United States and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) because although the 54-month delay between the defendant's arrest and the filing of the defendant's motion was presumptively prejudicial, and the state offered no explanation for the delay, the defendant did not file a request for speedy trial pursuant to O.C.G.A. § 17-7-171, the defendant did not assert the defendant's constitutional right to a speedy trial for the 54 months between the defendant's arrest and the filing of the defendant's motion to dismiss, and the trial court specifically found that the defendant failed to establish prejudice; the defendant's late assertion of the defendant's constitutional right to a speedy trial weighed heavily against the defendant as did the defendant's failure to show prejudice in light of such delay. *Falagian v. State*, 300 Ga. App. 187, 684 S.E.2d 340 (2009).

Trial court did not abuse the court's discretion in denying the defendant's motion to dismiss an indictment charging the defendant with armed robbery, O.C.G.A. § 16-8-41, for a violation of the defendant's right to due process because the defendant failed to show that the defense was prejudiced by the six-year delay between the commission of the crime and the defendant's arrest or that the state deliberately delayed the arrest to obtain a tactical advantage; the defendant was arrested and indicted for armed robbery, a noncapital felony, within the applicable seven-year statute of limitation, O.C.G.A. §§ 16-8-41(a) and 17-3-1(c), and the mere existence of the possibility that the latent prints could have established "the real perpetrator" if the prints had matched the prints of another offender in the government's database did not establish actual prejudice. *Billingslea v. State*, 311 Ga. App. 490, 716 S.E.2d 555 (2011).

**Trial court erroneously placed upon defendants burden of proving**

**actual prejudice.** — Judgment denying the defendants' pleas in bar, which were urged on the basis that the defendants were denied the right to a speedy trial under the Sixth Amendment of the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), was vacated because the trial court erroneously placed upon the defendants the burden of proving actual prejudice to their legal defense; the extraordinary six-year delay between the defendants' arrest and the pleas in bar raised the presumption of actual prejudice, and the defendants' failure to make a particularized showing of their decreased ability to present a defense at trial could not be weighed heavily against the defendants. *Smereczynsky v. State*, 314 Ga. App. 73, 722 S.E.2d 892 (2012).

**Speedy trial rights violated.**

Renewed motion for discharge and acquittal by the defendant was properly granted upon a determination that the defendant's constitutional speedy trial rights were violated under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI, as the delay of almost four years in bringing the defendant to trial was presumptively prejudicial, and the remaining *Barker-Doggett* factors weighed in the defendant's favor; only a small portion of the delay was attributable to the defendant and the defendant timely asserted the right to a speedy trial. *State v. Reid*, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

Defendant was denied the constitutional right to a speedy trial and to due process based on the state's intentional act of trading discovery responses for a speedy trial right, and the resulting prejudice from the disappearance of a material witness. The trial court therefore abused the court's discretion in denying the defendant's motion for discharge and acquittal. *Ditman v. State*, 301 Ga. App. 187, 687 S.E.2d 155 (2009), cert. denied, No. S10C0539, 2010 Ga. LEXIS 243 (Ga. 2010).

Indictment was dismissed because the defendant's constitutional right to a speedy trial under the Sixth Amendment was violated as 32 months elapsed from the time of the defendant's arrest until the trial court's order denying the defendant's

motion to dismiss the indictment. Furthermore, the balancing test for a speedy trial violation showed that the length of the delay, the blame for the delay, and the prejudice to the defendant weighed against the State of Georgia, even though the defendant's failure to assert the defendant's right to a speedy trial weighed against the defendant. *Butler v. State*, 309 Ga. App. 86, 709 S.E.2d 293 (2011).

Denial of the defendant's motion to dismiss the defendant's indictment for violation of the defendant's constitutional right to a speedy trial was improper under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) because the trial court clearly erred in reaching several material factual findings of three of the four *Barker* factors: the cause of the delay, the assertion of the right to speedy trial, and prejudice. *Davis v. State*, 308 Ga. App. 843, 709 S.E.2d 343 (2011).

Dismissal of the indictment on speedy trial grounds was supported by the fact that, while a small portion of the delay was, in fact, attributable to the defendant, at least seven and a half years of the nine year delay was attributable to the state, and the defendant timely asserted the right after finally obtaining counsel and receiving discovery from the state. *State v. Brown*, 315 Ga. App. 544, 726 S.E.2d 500 (2012).

Speedy trial rights were violated when the defendant was brought to trial more than 53 months after being indicted, an uncommonly long delay that weighed against the state. The delay occasioned by the prosecuting attorney's announcement that the state intended to seek the death penalty, made on the day the case was set for trial for the tenth time, weighed more heavily against the state; while the defendant did not assert the right to a speedy trial until almost four years after the indictment, the defendant's late assertion was somewhat mitigated by the defendant's repeated insistence that the state comply with the state's discovery obligations; and the defendant suffered actual prejudice as a result of the defendant's inability to show the extent to which evidence tampering occurred, due to an officer's inability to recall important details of the investigation. *State v. Buckner*, 292 Ga. 390, 738 S.E.2d 65 (2013).

**Speedy trial rights not violated.** —

Three defendants failed to carry the burden of establishing that a 14-month delay in bringing defendants to trial was presumptively prejudicial and, therefore, violated defendants' right to a speedy trial, because the peculiar circumstances of the case authorized a finding that the case was being prosecuted with the promptness customary for a complex drug trafficking case involving multiple defendants. Defendants failed to show that such a delay was presumptively prejudicial under the circumstances of the case: (1) the case was more akin to a complex conspiracy charge, as opposed to an ordinary street crime, since the indictment charged 11 people with the serious offense of trafficking in cocaine; (2) defendants acknowledged in the trial court and in appellate briefs that there was a massive amount of evidence for discovery, including thousands of documents, thousands of telephone records, and hundreds of hours of taped conversations; and (3) there was also a federal investigation of the drug operation going on at the same time as the state investigation. *Lawrence v. State*, 289 Ga. App. 698, 658 S.E.2d 144 (2008), cert. denied, No. S08C1086, No. S08C1084, 2008 Ga. LEXIS 467, 486, 512 (Ga. 2008).

There was no violation of the defendant's constitutional speedy trial rights under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), as a delay in bringing defendant to trial due to a backlog in the court system was not shown to have caused any prejudice to the defendant, and the defendant failed to timely assert the right to a speedy trial. *Thomas v. State*, 296 Ga. App. 231, 674 S.E.2d 96 (2009).

Defendant's constitutional speedy trial right was not violated by delays ranging from two to five years. The primary reason for the delay was the defendant's cooperation in another inmate's case, to which the defendant agreed; the defendant waited several years to assert the speedy trial right; and there was no prejudice to the defendant, who was already serving a lengthy federal prison sentence. *Marshall v. State*, 286 Ga. 446, 689 S.E.2d 283 (2010).

Although defendant contended the trial

court should have dismissed the charges against the defendant because the defendant was denied the defendant's constitutional right to a speedy trial under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI the record revealed no basis for granting such a motion because the record showed that any delay in bringing the case to trial was primarily attributable to defendant and that any resulting prejudice worked to the defendant's benefit, factors which weighed against defendant and defeated any contention that the defendant was deprived of the defendant's constitutional right to a speedy trial. *Zeger v. State*, 306 Ga. App. 474, 702 S.E.2d 474 (2010).

As two defendants' speedy trial time from the date of the defendants' mistrial through to the date the defendants' second dismissal motion was denied was only a little over three months, there was no presumption of prejudice and the defendants' speedy trial rights were not violated under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. 1, Para. XI(a). *Brewington v. State*, 288 Ga. 520, 705 S.E.2d 660 (2011).

Trial court did not abuse the court's discretion in finding that the defendant's constitutional right to a speedy trial was not violated and in denying the defendant's plea in bar and motion to dismiss the indictment because the defendant failed to show that the delay in bringing the case to trial was purposeful on the part of the state or that the defendant was harmed by the loss of evidence, and since there was no evidence that the state deliberately tried to hamper the defense with delaying the trial, the state's negligence in not bringing the case to trial sooner was considered "relatively benign"; the defendant, who had the benefit of counsel since shortly after the arrest, did not file a statutory demand for speedy trial pursuant to O.C.G.A. § 17-7-170 and did not assert the constitutional right to a speedy trial until 38 months after the arrest, and the defendant failed to present evidence of any significant anxiety or concern beyond that normally felt by someone facing criminal charges. *Weems v. State*, 310 Ga. App. 590, 714 S.E.2d 119 (2011).

Trial court did not abuse the court's

discretion when the court denied the defendant's claim that the defendant's constitutional right to a speedy trial was violated because neither the defendant nor the defendant's initial attorney made themselves aware of the actual status of the case between 1998 and 2005, and the defendant failed to keep the defendant's address up to date with the trial court such that the court was unable to send the notice for the arraignment to the defendant's home address; the defendant never made a speedy trial demand during the nine years that passed between the arrest and trial, the defendant was not subjected to oppressive pre-trial incarceration and did not suffer any unusual anxiety or concern because the defendant was not actually incarcerated for most of the nine years in question, and the defendant also was not prejudiced by lost evidence. *Rafi v. State*, 289 Ga. 716, 715 S.E.2d 113 (2011).

While the superior court erred in failing to analyze separately whether the pretrial delay was uncommonly long, and it should have weighed that factor against the state, the superior court acted within the court's discretion in finding that the reasons for the delay weighed in favor of the state, that the defendant's long delay in asserting the defendant's speedy trial right weighed heavily against the defendant, and that the defendant failed to show any prejudice resulting from the delay and in weighing this factor against the defendant. *Sechler v. State*, 316 Ga. App. 675, 730 S.E.2d 142 (2012).

**Prejudice not shown by lack of professional employment.** — Court of appeals erred in affirming the trial court's order granting the defendant's motion to dismiss an indictment on the ground that the state violated the defendant's constitutional right to a speedy trial because the trial court erred in finding that the defendant suffered undue anxiety since the charges made it impossible for the defendant to get a professional job; that finding implied that the defendant had held a professional job at some point, had the ability to obtain one, or lost one as a result of the defendant's arrest, but there was no evidence concerning that point. *State v. Pickett*, 288 Ga. 674, 706 S.E.2d 561 (2011).

**A 13-month delay.** — Defendant did not carry defendant's burden of establishing that a 13-month delay between defendant's arrest and trial was "presumptively prejudicial," and accordingly the trial court did not err when it denied defendant's contention that defendant had been denied the constitutional right to a speedy trial; defense counsel was removed by the trial court three days before trial was scheduled to commence, and several murder convictions appealed to the court had featured pre-trial delays of 12 to 16 months. *Williams v. State*, 282 Ga. 561, 651 S.E.2d 674 (2007).

Trial court properly denied a murder defendant's motion to dismiss an indictment on speedy trial grounds. Although the court found that the 13-month delay was caused by the state's negligence, the court also found that the defendant had not timely asserted the defendant's speedy trial right and that the defendant had not shown that the delay impaired the defense. *Hassel v. State*, 284 Ga. 861, 672 S.E.2d 627 (2009).

**A 22-month delay.** — Trial court did not abuse the court's discretion by denying the defendant's motion to dismiss the charges for lack of a speedy trial because while the lengthy delay was attributable to the state, the defendant did not assert the right to a speedy trial in the 22 months after the defendant's current counsel was hired, and the defendant was not significantly prejudiced by the delay; the state's failure to produce the codefendant did not prejudice the defendant since the defendant could have subpoenaed the codefendant personally instead of relying on the state to produce the codefendant simply because the codefendant was included in the state's witness list. *Ward v. State*, 311 Ga. App. 425, 715 S.E.2d 818 (2011).

**Three year delay.** — There was no speedy trial violation under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a). Although the delay of over three years was presumptively prejudicial, the delay was primarily attributable to the defendant; the defendant delayed in asserting the constitutional right to a speedy trial; and the defendant's generalized statements, along with the

fact that the record did not show that trial counsel attempted to locate the physician who examined the victim, did not suffice to show prejudice. *Robinson v. State*, 298 Ga. App. 164, 679 S.E.2d 383 (2009).

**A 32-month delay.** — With regard to charges of aggravated child molestation, child molestation, and rape, a trial court did not err in denying a defendant's motion for discharge and acquittal since although the 32 month passage of time between the defendant's arrest and the filing of the motion for discharge was presumed prejudicial and more than half of the delay was attributable to the state, the defendant waited 32 months to file the motion and failed to show any prejudice arising from the delay. The defendant failed to explain what physical evidence was affected by the passage of time and merely made a generalized statement that memories fade over time. *Wofford v. State*, 299 Ga. App. 129, 682 S.E.2d 125 (2009).

**A 40-month delay was not prejudicial.** — In a defendant's motion for acquittal based upon a speedy trial violation under U.S. Const. amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), although the delay of 40 months raised a presumption of prejudice, no evidence supported defendant's claim of anxiety and concern over the charges nor the defendant's claims that the defendant was unable to produce two witnesses who would have provided information material to the defendant's defense. In the absence of prejudice, the defendant's motion for acquittal was properly denied. *Lynch v. State*, 300 Ga. App. 723, 686 S.E.2d 268 (2009).

**Four-year delay.** — Although there was a presumption of prejudice due to the four-year delay with respect to a defendant's speedy trial rights under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. 1, Para. XI(a), there was no violation thereof upon analysis of the four factors; the reason for the delay was due to the defendant's counsel, the defendant did not file a timely demand for a speedy trial, and the defendant did not show prejudice. *Brewington v. State*, 288 Ga. 520, 705 S.E.2d 660 (2011).

**A 54-month delay.** — Trial court erred by denying a defendant's motion to dis-

miss the indictment on speedy trial grounds, which charged the defendant with the crimes of aggravated assault, aggravated battery, and cruelty to children, as the 54-month delay at issue was substantial and longer than delays that the Georgia Supreme Court has described as egregious and deplorable; the evidence showed that the delay resulted from a deliberate, strategic decision by the state since it chose to dead-docket the case; and the defendant asserted the right to a speedy trial in due course. The trial court erred in several respects in the court's legal analysis of the defendant's constitutional speedy trial claim, namely: by failing to weigh the length of the delay as part of the court's balancing analysis and by failing to adequately address the reasons for that delay; by abusing the court's discretion in finding that the defendant's three-to-four month delay in asserting the right to a speedy trial should be weighed against the defendant; and by finding that the defendant was required to present additional evidence of actual prejudice caused by the state's conduct. *Hayes v. State*, 298 Ga. App. 338, 680 S.E.2d 182 (2009).

**A 45-month delay presumptively prejudicial.** — For purposes of U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), a delay of three years and nine months from the date of the defendant's arrest and the date of the defendant's scheduled trial was presumptively prejudicial. *State v. Reid*, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

**Five year delay did not prejudice defendant.** — A trial court did not abuse its discretion in finding that a defendant failed to show a constitutional violation of the defendant's right to a speedy trial and by denying the defendant's motion for discharge and acquittal with regard to the defendant's convictions for sexual assault as the defendant never filed a speedy trial demand; there was no evidence nor finding by the trial court that the state intentionally delayed the trial to impair the defendant's defense; the defendant's failure to assert either a statutory or constitutional right to a speedy trial was entitled to strong evidentiary weight against the defendant; and the fact that the defen-

dant never filed a speedy trial demand suggested that the defendant was not suffering anxiety or stress from the delay. The reviewing court noted that the five year delay in bringing the defendant to trial was solely based on requests from defense counsel due to illness, death in the family, or death of an expert witness. *Disharoon v. State*, 288 Ga. App. 1, 652 S.E.2d 902 (2007).

Despite the state's five-year delay in bringing defendant's child molestation case to trial, defendant's motion to dismiss based on defendant's speedy trial right was denied because the defendant waited more than five years to assert defendant's statutory right under O.C.G.A. § 17-7-171 and the defendant failed to show any prejudice resulting from the delay. *Arbegast v. State*, 301 Ga. App. 462, 688 S.E.2d 1 (2009), cert. denied, No. S10C0630, 2010 Ga. LEXIS 348 (Ga. 2010).

Defendant was not entitled to the dismissal of an indictment based on a violation of the defendant's speedy trial rights because, while the delay of 63 months from the date of arrest to the dismissal was presumptively prejudicial, the delay was based on the state's neglect rather than any bad faith; the defendant also failed to assert the right to a speedy trial in a timely manner as the motion was filed more than 15 months after the defendant's indictment. *State v. Hartsfield*, 308 Ga. App. 753, 711 S.E.2d 1 (2011).

**15-year delay.** — While the length of the delay in bringing the appeal, 15 years, was excessive, the delay did not violate the defendant's due process rights since the delay was largely attributable to the defendant, the defendant failed to show that the defendant asserted the defendant's appellate rights for much of the 15-year period at issue, and the defendant failed to show actual prejudice to the defendant's ability to assert arguments on appeal. *Payne v. State*, 289 Ga. 691, 715 S.E.2d 104 (2011).

**19-year delay.** — Because the trial court neglected to consider all of the Barker factors, including, the entire relevant pretrial delay of nearly 19 years that elapsed between defendant's arrest and the denial of defendant's plea in bar, a

remand was required to determine if defendant's constitutional speedy trial rights were violated. *Goddard v. State*, 315 Ga. App. 868, 729 S.E.2d 397 (2012).

**Trial court miscalculated.** — On remand, a trial court erred by denying defendant's motion for discharge and acquittal based on a speedy trial violation because it made a significant factual error in its calculation of the length of the delay by not including the time that had elapsed between the trial court's original and new orders addressing the speedy trial claim. *Richardson v. State*, 318 Ga. App. 155, 733 S.E.2d 444 (2012).

**No violation of right when delay attributable to conduct of defendant.**

The trial court properly found that a defendant's right to a speedy trial was not violated since the defendant was responsible for at least seven months of the 18 months of delay and the defendant did not argue that the delay impaired the defendant's trial or affected the availability of witnesses or evidence; although the defendant claimed that there was damage to the defendant's private life, the defendant also testified that it was the arrest that affected the defendant's medical practice and family life and there was no evidence of any deliberate delay by the state intended to prejudice the defendant. *Vyas v. State*, 285 Ga. App. 467, 646 S.E.2d 692 (2007).

**Whether delay between indictment and trial violates constitutional right to speedy trial depends on circumstances.**

Dismissal of an indictment on speedy trial grounds was in error and remand was appropriate because the trial court erred in the court's key factual findings regarding the defendant's anxiety and concern and actual impairment to the defense and, additionally, the trial court attributed only eight months of delay to the State of Georgia, without addressing the reasons for the nearly eight additional years of delay, including a year of delay caused, apparently deliberately, when the defendant became a fugitive. Moreover, the trial court did not properly balance the factors so that the intermediate appellate court could not properly affirm the judgment. *State v. Porter*, 288 Ga. 524, 705 S.E.2d 636 (2011).

**Effect of assertion of or failure to assert right.**

Court of appeals erred in determining, apparently from the court's own review of the record, that the speedy trial factor of whether, in due course, the defendant asserted his or her right to a speedy trial would be weighed against the defendant based on the more than five year delay from the defendant's arrest to the defendant's assertion of the right; a delay of over five years typically would warrant the speedy trial factor of whether, in due course, the defendant asserted his or her right to a speedy trial being weighed heavily against the defendant, and if the factor is to be weighed differently based on the particular circumstances of the case, that exercise of discretion is committed to the trial court, not the appellate courts. *State v. Pickett*, 288 Ga. 674, 706 S.E.2d 561 (2011).

Trial court erred by dismissing the murder indictment against defendant based on a speedy trial violation because although the over five year delay was presumptively prejudicial, defendant failed to assert his constitutional right to a speedy trial until after five years had passed and on the eve of the rescheduled trial, thus, the trial court should have determined whether that factor weighed against him. *State v. Johnson*, 291 Ga. 863, 734 S.E.2d 12 (2012).

**Indictments generally.** — There is no right to a speedy indictment. *Griffin v. State*, 282 Ga. 215, 647 S.E.2d 36 (2007), overruled on other grounds, *Garza v. State*, 284 Ga. 696, 670 S.E.2d 73 (2008).

**Jurors****1. Selection****Use of peremptory strikes to exclude minorities.**

The trial court's finding that the defendant failed to set forth a prima facie case of racial discrimination sufficient to support a Batson challenge was not clearly erroneous, as the defendant failed to show that the totality of the relevant facts gave rise to an inference of discriminatory purpose. Moreover, the number of strikes by the state exercised against African-American veniremen did not give rise to an

inference of discrimination. *Ludy v. State*, 283 Ga. 322, 658 S.E.2d 745 (2008).

Because defendant waived any objection regarding an unsummoned juror, and because evidence supported the trial court's finding that the state's reasons for striking the challenged jurors were race-neutral, defendant did not show that counsel's failure to object constituted ineffective assistance. *Allen v. State*, 299 Ga. App. 201, 683 S.E.2d 343 (2009).

Trial court did not abuse the court's discretion in ruling that the defendant failed to establish a prima facie case of discriminatory purpose based on gender by using seven of the prosecution's eight peremptory strikes against women. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Trial court did not abuse the court's discretion in ruling that the defendant failed to establish a case of unconstitutional race-based discrimination by the prosecution using three of the prosecution's eight peremptory strikes against African-Americans. The reasons offered for the three strikes were race neutral and not pretextual. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

**Juror properly disqualified for bias.** — Because a prospective juror stated during voir dire that the juror did not know if the juror could set aside the juror's friendship with defendant and render a fair and impartial verdict based on the evidence and the law, the prospective juror was properly excused for cause. *Paul v. State*, 296 Ga. App. 6, 673 S.E.2d 551 (2009).

**No error in refusal to strike for cause when prospective juror had not prejudged case.** — When a prospective juror indicated that the prospective juror would expect a defendant to testify and would do the juror's best to follow the law if the court instructed the jury that no inference was to be drawn from the fact that the defendant chose not to testify, there was no error in the trial court's refusal to strike the prospective juror for cause, because nothing showed that the prospective juror had prejudged any issue in the case. *Johnson v. State*, 291 Ga. 621, 732 S.E.2d 266 (2012).

## 2. Qualifications

**Refusal to excuse upheld.** — Trial court did not err by refusing to excuse certain jurors, since the subject jurors indicated that the jurors would be able to base the jurors' decision on the evidence presented, would keep an open mind, and could consider all three sentencing options that would be available. *Rice v. State*, 292 Ga. 191, 733 S.E.2d 755 (2012).

**Jurors were clients of opposing counsel.** — Pursuant to O.C.G.A. § 15-12-134 and Ga. Const. 1983, Art. I, Sec. 1, Para. XI(a), a trial court erred in failing to either grant a challenge for cause or to effectively rehabilitate two jurors who expressed a clear preference for opposing counsel because both were or had been clients of opposing counsel. *Harper v. Barge Air Conditioning, Inc.*, 313 Ga. App. 474, 722 S.E.2d 84 (2011).

## Waiver of Rights

### Counsel's advice to waive jury trial.

— Counsel was not ineffective for advising a murder defendant to waive the right to a jury trial. This advice was based on reasonable trial strategy as defendant testified that counsel believed that a judge, having been exposed to cases involving similar violence, would be more lenient than a jury; moreover, the defendant's acquittal of murder and conviction on the lesser offense of voluntary manslaughter strongly supported the conclusion that counsel was effective, and the defendant was advised by the trial court that the decision to waive a jury trial rested with the defendant. *Smith v. State*, 291 Ga. App. 725, 662 S.E.2d 817 (2008).

### Waiver not shown.

Upon a withdrawal of opposition by the state, because an inmate was not advised of the constitutional right to a jury trial, and the court could find no extrinsic evidence in the record to conclude that the inmate knowingly, intelligently, and voluntarily waived the right to a jury trial on the state drug charges at issue, an order denying habeas relief was reversed, and the case was remanded. *Sutton v. Sanders*, 283 Ga. 28, 656 S.E.2d 796 (2008).

### Waiver shown.

A trial court did not err by finding that

defendant made a personal, knowing, and intelligent waiver of the right to a jury trial with regard to defendant's convictions for aggravated child molestation and two counts of child molestation after a bench trial because, before trial began, defense counsel stated that defendant wished to waive the jury trial right and proceed with a bench trial, and the trial court questioned defendant, who confirmed that defendant wanted a bench trial and that defendant understood the choice. Further, at the hearing on defendant's motion for a new trial, defendant testified that defendant discussed the matter at length with defense counsel before trial and stated that defendant wanted the judge, not a jury, to decide defendant's fate. *Brumbelow v. State*, 289 Ga. App. 520, 657 S.E.2d 603 (2008).

In an auto dealer's suit against a car buyer, the buyer's waiver of the right to a jury trial under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) and O.C.G.A. § 9-11-38 was implied by the buyer's failure to make a written demand for a jury trial or to object to the case being specially set for a bench trial at a hearing on the buyer's successful motion to vacate a judgment entered in favor of the dealer. *Cole v. ACR/Atlanta Car Remarketing, Inc.*, 295 Ga. App. 510, 672 S.E.2d 420 (2008).

In a defendant's prosecution for criminal trespass, the defendant's waiver of the defendant's right to a jury trial was voluntary and intelligent because while the timing of the colloquy was unusual as a witness had already testified on direct, no indication was given that the trial court would not have honored the defendant's right to a jury trial and the defendant indicated that the defendant was comfortable with waiving that right. *Thomas v. State*, 297 Ga. App. 416, 677 S.E.2d 433 (2009).

Finding that the defendant voluntarily, knowingly, and intelligently waived the right to a jury trial was supported by a signed waiver of the right and trial counsel's testimony that counsel explained to the defendant that the defendant had a right to a jury trial and that counsel believed a judge would be more receptive than a jury to the technical legal defense they had discussed. *Seitman v. State*, No. 10-1000000-0000.

A12A2287, 2013 Ga. App. LEXIS 245 (Mar. 21, 2013).

RESEARCH REFERENCES

**ALR.** — Determination of request for exclusion of public from state criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer — issues of proof, consideration of alternatives, and scope of closure, 32 ALR6th 171.

Basis for exclusion of public from state

criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer, 33 ALR6th 1.

Construction and application of Speedy Trial Act, 18 USCS §§ 3161 to 3174 — United States Supreme Court cases. 46 ALR Fed. 2d 129.

Paragraph XII. Right to the courts.

**Law reviews.** — For comment, “Inappropriate Forum or Inappropriate Law? A Choice of Law Solution to the Jurisdic-

tional Standoff Between the United States and Latin America,” see 60 Emory L.J. 1437 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
SELF-REPRESENTATION  
RIGHT TO BE PRESENT

General Consideration

**Reviewability of constitutionality claim.** — Because the Court of Appeals of Georgia was bound by the Supreme Court of Georgia’s order transferring a personal injury plaintiff’s appeal and expressly held that the trial court did not rule on whether O.C.G.A. § 9-11-68(d) was constitutional, the Court of Appeals declined to consider the defendants’ arguments that the statute was constitutional. *Buchan v. Hobby*, 288 Ga. App. 478, 654 S.E.2d 444 (2007).

**Right to testify not violated.** — Defendant’s constitutional right to testify in the defendant’s own behalf had not been violated. The trial court established that the defendant knew that the defendant had the right to testify if the defendant wanted to but elected not to after consulting with defense counsel. *Branford v. State*, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

**Recovery of attorney’s fees.** — Trial court erred in finding that the Tort Reform Act of 2005, O.C.G.A. § 9-11-68, violated Ga. Const. 1983, Art. I, Sec. I, Para. XII,

since it permitted the recovery of attorney’s fees absent the prerequisite showings of either O.C.G.A. § 9-15-14 or O.C.G.A. § 13-6-11, because there was no constitutional requirement that attorney’s fees be awarded only pursuant to § 9-15-14 or § 13-6-11; in Georgia, attorney’s fees are recoverable where authorized by some statutory provision or by contract, and § 9-11-68, is such a statutory provision authorizing the recovery of attorney’s fees under specific circumstances. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

**Right to counsel at restitution hearing.** — Trial court erred in refusing to allow defendant’s counsel, who was present in the defendant’s absence at the restitution hearing, to cross-examine the victim, produce evidence, or present any argument on the defendant’s behalf because a criminal defendant is entitled to representation by counsel at all critical stages of the proceeding, including sentencing, which included any hearing on restitution. *Gibson v. State*, 319 Ga. App. 627, 737 S.E.2d 728 (2013).

Cited in *Wheatley v. Moe's Southwest Grill, LLC*, 580 F. Supp. 2d 1324 (N.D. Ga. 2008); *DeLong v. State*, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

### Self-Representation

**Voluntary, knowing, and intelligent waiver of right to counsel.** — Trial court did not err in denying the defendant's pro se motion for new trial by failing to warn the defendant of the dangers of self-representation because the trial court's colloquy with the defendant supported a finding that the defendant voluntarily, knowingly, and intelligently waived the right to counsel; the defendant, who was charged with driving under the influence of alcohol to the extent that the defendant was a less safe driver, was a long-standing member of the Georgia Bar with experience in trying driving under the influence cases, and was assisted by a licensed member of the Bar sitting at counsel table. *Davis v. State*, 301 Ga. App. 484, 687 S.E.2d 854 (2009), cert. dismissed, No. S10C0633, 2010 Ga. LEXIS 339 (Ga. 2010).

**Right to self-representation on appeal.** — Trial court erred in refusing to allow a defendant to represent oneself at the hearing for defendant's motion for new trial or on appeal because, while the federal constitution did not recognize a defendant's right to self-representation on appeal, Georgia case law and Ga. Const. 1983, Art. I, Sec. I, Para. XII recognized a right to self-representation on appeal. *Cook v. State*, 296 Ga. App. 496, 675 S.E.2d 245 (2009).

**Denial of right to self representation not found.**

Defendant was not wrongfully denied the constitutional right to self-representation because inasmuch as the defendant's handwritten note sought to dismiss trial counsel and replace them with retained counsel, a public defender, or the defendant, the communication was not an unequivocal assertion of the defendant's right to self-representation. *Danenberg v. State*, 291 Ga. 439, 729 S.E.2d 315 (2012), cert. denied, U.S. , 133 S. Ct. 941, 184 L. Ed. 2d 726 (2013).

### Right to be Present

**No right to be present at sidebar conference.** — Defendant's right to be present was not violated due to the defendant's absence from sidebar conferences. *Smith v. State*, 319 Ga. App. 590, 737 S.E.2d 700 (2013).

**No right to be present at discussion of whether character in issue.** — Discussion between the trial court and counsel over whether the defendant's character had been placed in issue by questions from the defense regarding the defendant's service in Vietnam and the defendant's work with children was not a critical stage of the proceeding at which the defendant had the right to be present. Defendant was present when defense counsel made a motion to strike the character evidence and when the judge ruled on the motion. *Lyde v. State*, 311 Ga. App. 512, 716 S.E.2d 572 (2011).

**Waiver of right.** — A defendant had waived the right to be present at trial by choosing not to attend the first day of the sentencing phase after a medical expert examined the defendant, treated the defendant, and pronounced the defendant fit to proceed. *Dawson v. State*, 283 Ga. 315, 658 S.E.2d 755 (2008), cert. denied, 129 S. Ct. 169, 172 L.Ed.2d 122 (2008).

Defendant waived the right to be present during the bench conferences discussing the dismissal of a juror and the ultimate removal of the juror by failing to voice any objection regarding the defendant's absence from that portion of the trial until the proceedings before the Supreme Court of Georgia. *Zamora v. State*, 291 Ga. 512, 731 S.E.2d 658 (2012).

**Deprivation of right to be present entitles defendant to new trial.**

Defendant was entitled to a reversal of the defendant's convictions for improper lane change, serious injury by vehicle while driving under the influence, and misdemeanor obstruction of an officer as the trial judge violated the defendant's right to be present at all stages of the proceedings by responding to a jury inquiry in writing that the jury should continue to deliberate and try to reach an unanimous verdict without contacting defense counsel and defendant. Given the necessary considerations and significant

ramifications, instructions to the deliberating jury concerning its reported deadlocked status on several counts constituted a substantive communication at a critical stage in the defendant's criminal prosecution. *Wells v. State*, 297 Ga. App. 153, 676 S.E.2d 821 (2009).

**Proceeding in absence of accused does not always require new trial.**

Because the defendant's right to be present at trial did not extend to any and all communications between the trial courts and potential jurors, the defendant had no right to be present for an out of court conversation between the trial judge and one of the jurors from the venire panel held while the judge was fulfilling the administrative duties as the presiding judge for the circuit. Thus, the defendant was not entitled to a new trial as a result. *Payne v. State*, 290 Ga. App. 589, 660 S.E.2d 405 (2008).

**Communication with jury outside presence of defendant.**

Defendants' rights to be present under Ga. Const. 1983, Art. I, Sec. I, Para. XII were violated because a trial court excused a juror during ex parte proceedings in the defendants' absence and without the defendants' knowledge or consent, and the defendants' absence was neither consented to nor waived; although neither counsel objected to the trial court's action, such inaction on the part of counsel did not constitute a waiver for the clients, and since the defendants were not informed of the ex parte excusal of the juror, the defendants' could not knowingly acquiesce

to the waiver on the part of defense counsel. *Ward v. State*, 288 Ga. 641, 706 S.E.2d 430 (2011).

**Failure to consult before responding to deadlocked jury.** — A defendant's right to be present under Ga. Const. 1983, Art. I, Sec. I, Para. XII was not violated by the trial court's failure to consult with the defendant and counsel prior to responding to the jury's communication that the jury was deadlocked. *Lowery v. State*, 282 Ga. 68, 646 S.E.2d 67, cert. denied, 552 U.S. 999, 128 S. Ct. 508, 169 L. Ed. 2d 355 (2007).

**No right to be present at charge conference during jury deliberations.**

— There was no violation of defendant's right to be present at all proceedings under Ga. Const. 1983, Art. I, Sec. I, Para. XII when defendant was excluded from a charge conference that occurred during jury deliberations as that was not a stage of a criminal proceeding that invoked the right to be present. *Milligan v. State*, 307 Ga. App. 1, 703 S.E.2d 1 (2010).

**Right to be present regardless of whether the party's physical or mental condition may evoke sympathy.** —

Party may not be excluded from the party's own trial simply because the party's physical and mental condition may evoke sympathy. Instead, trial courts can and should address the risk of undue sympathy using jury instructions and other common and time-tested means of ensuring that both parties receive a fair trial, without infringing on the parties' right to be present. *Kesterson v. Jarrett*, 291 Ga. 380, 728 S.E.2d 557 (2012).

RESEARCH REFERENCES

**ALR.** — Hospital as within constitutional provision forbidding unreasonable searches and seizures, 28 ALR6th 245.

Application in state narcotics cases of collective knowledge doctrine or fellow officers' rule under Fourth Amendment — marijuana cases, 35 ALR6th 497.

Validity of search of cruise ship cabin, 43 ALR6th 355.

Validity of search and reasonable expectation of privacy as affected by no trespassing or similar signage, 45 ALR6th 643.

Construction and application of "auto-

matic companion rule" or person's "mere propinquity" to arrestee to determine propriety of search of person for weapons or firearms, 47 ALR6th 423.

Construction and application of consent-once-removed doctrine, permitting warrantless entry into residence by law enforcement officers for purposes of effectuating arrest or search where confidential informant or undercover officer enters with consent and observes criminal activity or contraband in plain view, 50 ALR6th 1.

Sufficiency of showing to support

no-knock search warrant — cases decided after *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 l. Ed. 2d 615 (1997), 50 ALR6th 455.

Construction and application of Supreme Court's holding in *Arizona v. Gant*, 129 S. Ct. 1710, 173 L. Ed. 2d 485, 47 A.L.R. Fed. 2d 657 (2009), that police may

search vehicle incident to recent occupant's arrest only if arrestee is within reaching distance of passenger compartment at time of search or it is reasonable to believe vehicle contains evidence of offense — substantive traffic offenses, 55 ALR6th 1.

## Paragraph XIII. Searches, seizures, and warrants.

**Law reviews.** — For note, "The Online Zoom Lens: Why Internet Street-Level Mapping Technologies Demand Reconsideration of the Modern-Day Tort Notion of 'Public Privacy,'" see 43 Ga. L. Rev. 575 (2009).

## JUDICIAL DECISIONS

### ANALYSIS

#### FOURTH AMENDMENT RIGHTS

##### SEARCHES AND SEIZURES

1. IN GENERAL
2. SEARCHES
3. CONSENT SEARCHES
4. INVENTORY SEARCHES

##### SEARCH WARRANTS

1. IN GENERAL
2. INFORMANTS' RELIABILITY AND AFFIDAVITS
3. PROBABLE CAUSE
4. EXCEPTIONS TO WARRANT REQUIREMENT

##### EVIDENCE

### Fourth Amendment Rights

#### Right to be free from police intrusion.

With regard to the defendant being charged with driving under the influence based on a report received from an off-duty officer, a trial court erred by denying the defendant's motion to suppress because the arresting officer's entry into the defendant's garage was not authorized since the threat to public safety had ended and the entry was not supported by probable cause or exigent circumstances. *Corey v. State*, No. A12A2365, 2013 Ga. App. LEXIS 185 (Mar. 13, 2013).

#### Evidence seized as result of illegal police activity.

While non-custodial and custodial statements were properly admitted, as not vitiating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a

result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree. *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

Trial court did not err in granting the defendant's motion to suppress statements, drugs, paraphernalia, and cash the police found after searching the defendant's home as fruit of the poisonous tree because although the police had authority to enter the house for the purpose of apprehending the defendant, the subsequent reentry by the police was illegal since an officer reentered the house without a warrant, valid consent, or exigent circumstances; both before and at the time of the defendant's arrest, the defendant told the police not to enter the house, and it could not be assumed that the victim's need for assistance justified the officer's reentry because the exigent circumstances authorizing entry for the limited purpose of effecting the defendant's arrest

had expired. *State v. Driggers*, 306 Ga. App. 849, 702 S.E.2d 925 (2010).

**Restraint reasonable.** — Neck restraint a narcotics investigator used in an effort to have the defendant spit out a baggy of suspected drugs was not unreasonable under the Fourth Amendment because the application of a neck restraint maneuver was reasonable under the circumstances; the investigator observed the defendant make a series of furtive attempts at concealing the clear plastic baggy, which the investigator believed contained drug contraband, from placing the baggy in the defendant's mouth to attempting to chew it up while the investigator sought to question the defendant. *Lewis v. State*, 317 Ga. App. 391, 730 S.E.2d 757 (2012).

**Probable cause for warrantless arrest.**

Probable cause authorized defendant's arrest for criminal attempt to manufacture methamphetamine, despite no illegal drugs being found on defendant, based on the similarities between the descriptions broadcasted in a be-on-the-look-out dispatch matched defendant's truck and passengers, the items found in the truck coincided with the manufacturing, and the opinion of one of the arresting officers, who had experience as a narcotics agent. *Kohlmeier v. State*, 289 Ga. App. 709, 658 S.E.2d 261 (2008).

**Roadblocks.**

Trial court properly denied a defendant's motion to suppress the evidence obtained from a police roadblock with regard to the defendant's conviction for driving under the influence as the trial court properly determined that the roadblock was conducted for a legitimate primary purpose, namely to check for valid licenses, insurance, impaired drivers, and safety concerns, which were consistent with the purposes set forth in the initiation form. Further, a variance in the location of the roadblock to an intersection of a street instead of on the actual street was insignificant and did not invalidate the roadblock. *Coursey v. State*, 295 Ga. App. 476, 672 S.E.2d 456 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence obtained during a roadblock because the

evidence was sufficient to show that the decision to implement the roadblock was made by a supervisory officer, which prevented the field officers from exercising unfettered discretion in stopping the drivers since the lieutenant and corporal who implemented the roadblock testified that they were supervisors in the traffic unit of the county sheriff's office; the trial court was authorized to find that the purposes of the roadblock, which were to serve as a traffic safety checkpoint and to check driver's licenses and to identify drivers driving under the influence, were as stated by the lieutenant and corporal, and each of the identified purposes set forth in the order for the roadblock was a legitimate primary purpose. *Rappley v. State*, 306 Ga. App. 531, 702 S.E.2d 763 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence obtained at a roadblock because, given the evidence presented, the trial court was authorized to conclude that the sergeant issued the order for the roadblock properly and initiated, authorized, and supervised the roadblock and that the sergeant's decision to implement the roadblock was made at the programmatic level for a legitimate primary purpose; the evidence supported the trial court's findings of fact that the information on the roadblock approval form, which stated the reasons for the roadblock, did not conflict with any evidence presented as to when the roadblock was to be conducted or by whom the roadblock was authorized. *Owens v. State*, 308 Ga. App. 374, 707 S.E.2d 584 (2011), cert. denied, No. S11C1036, 2011 Ga. LEXIS 498 (Ga. 2011).

Trial court did not err in denying the defendant's motion to suppress evidence seized at a roadblock because the state met the state's burden of establishing the legitimate purpose of the roadblock by introducing a certified copy of a department of public safety roadblock approval form; the programmatic purposes set out in the roadblock form were supported by the other evidence at the suppression hearing, and the police officers' actions at the scene were in line with those purposes. *Hite v. State*, 315 Ga. App. 221, 726 S.E.2d 704 (2012), cert. denied, No. S12C1286, 2012 Ga. LEXIS 1020 (Ga. 2012).

**DNA sample collection from convicted felons.** — O.C.G.A. § 24-4-60 (now O.C.G.A. § 35-3-160) did not violate the Fourth Amendment, the search and seizure provisions of the Georgia Constitution, or a convicted felons' rights to privacy under the United States or Georgia Constitutions. *Quarterman v. State*, 282 Ga. 383, 651 S.E.2d 32 (2007).

**Statement by juvenile questioned by school official, who was state's agent.** — Juvenile court properly suppressed one incriminating statement made by a juvenile, regarding the robbery of two students in a bathroom during a basketball game, as the juvenile was questioned by an agent of the police with the involvement and participation of the school resource officer. Further, the juvenile was in custody and, thus, entitled to Miranda warnings, which had not been given. In the Interest of T.A.G., 292 Ga. App. 48, 663 S.E.2d 392 (2008).

## Searches and Seizures

### 1. In General

#### Defendant lacked standing.

In a prosecution for, *inter alia*, felony murder, a defendant did not have standing to suppress the evidence of a gun recovered from a hotel room pursuant to a search warrant as the defendant was not the registered guest at the hotel but merely visited the guest on three occasions and, thus, had no reasonable expectation of privacy in the room. *Watkins v. State*, 285 Ga. 107, 674 S.E.2d 275 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence an officer seized from the defendant's vehicle because the evidence undisputedly showed that the defendant had abandoned the vehicle, and since the defendant abandoned the defendant's car, the defendant had no standing to assert the claim that the search was invalid as a warrantless search incident to an arrest; the defendant abandoned the defendant's vehicle when the defendant fled to escape police, leaving the vehicle parked in a stranger's driveway with the door open, and before searching the open vehicle, an officer even confirmed with the landowner that the defendant's vehicle was not

parked there with the owner's permission. *Johnson v. State*, 305 Ga. App. 635, 700 S.E.2d 612 (2010).

**Encounter with police officer not a seizure.** — Fact that officer activated blue lights when parking behind defendant, whose car was parked in front of a closed business with its motor running and its headlights on, did not turn the encounter into a seizure requiring reasonable suspicion; given the late hour, darkness, officer's intention to offer assistance, and fact that both the officer and defendant were parked in the travel lane, it could not be said that the defendant was not free to leave. *Darwicki v. State*, 291 Ga. App. 239, 661 S.E.2d 859 (2008).

#### Officer had reasonable suspicion warranting investigation.

Because a detective's suspicions were raised by the defendant's odd behavior and the detective thought that something might be hidden in the defendant's shoes, the detective was permitted to detain the defendant in order to maintain the status quo while obtaining more information concerning that suspicion; thus, when combined with the defendant's valid consent, suppression of the evidence seized was unwarranted. *Lane v. State*, 287 Ga. App. 503, 651 S.E.2d 798 (2007), cert. denied, No. S08C0187, 2008 Ga. LEXIS 185 (Ga. 2008).

Because an officer was authorized to: (1) detain the defendant for investigatory purposes based on a 9-1-1 call reporting a domestic disturbance; (2) pat the defendant down for weapons; (3) seize the cocaine from the defendant's pocket under the plain feel doctrine; (4) search the defendant's vehicle; and (5) seize the contraband found during that search, the trial court properly denied the defendant's motion to suppress. *Lester v. State*, 287 Ga. App. 363, 651 S.E.2d 766 (2007).

It was error to suppress evidence obtained from a warrantless search of a defendant's truck; information from a reliable informant, much of whose information had been confirmed before officers stopped the truck, provided officers with reasonable suspicion to make an investigative stop of the truck, after which the alerting of a drug dog further corroborated the source's information and provided

probable cause for the search of the truck. *State v. Jones*, 287 Ga. App. 259, 651 S.E.2d 186 (2007).

Given that an officer, responding to a disturbance call in a remote location of the precinct involving the defendant, had a reasonable safety concern, and because the call described the defendant as loud, belligerent, and possibly intoxicated, the officer had a sufficient basis to conduct a pat-down search of the defendant; hence, the defendant's motion to suppress the evidence of a concealed weapon and drugs found following a search was properly denied. *Walker v. State*, 289 Ga. App. 657, 658 S.E.2d 207 (2008).

Because law enforcement officers were given permission to enter a landowner's land in order to investigate the presence of possible trespassers for engaging in other illegal activity on said property, and found the defendant and a cohort, they gained a reasonable and articulable suspicion that the two individuals were involved in some form of criminal activity, the very least of which was criminal trespass, and therefore had the authority to detain them in a brief investigative stop; thus, suppression of the evidence seized as a result of the encounter was properly denied, after the cohort ran, and the defendant failed to comply with the officers' orders, given that said actions amounted to probable cause to support a warrantless arrest and a search thereafter. *Burgess v. State*, 290 Ga. App. 24, 658 S.E.2d 809 (2008).

Trial court order suppressing drug evidence seized after a Terry stop of the defendant for parking in the middle of the road was error because O.C.G.A. § 40-6-200(a) made it improper to park in the middle of a two-way roadway, and provided a sound basis for the officer's decision to stop the defendant; as a result, the stop of the defendant was proper. *Stafford v. State*, 284 Ga. 773, 671 S.E.2d 484 (2008).

An officer had reasonable suspicion to stop the defendant's vehicle, which matched the description of one the officer had been told to be on the lookout for, as it was connected with previous suspicious activity and with a suspect who was wanted by police, and it was described

with great particularity. Furthermore, as the officer was justified in detaining the defendant long enough to determine whether an outstanding warrant was valid, the extent of the stop did not exceed the permissible scope of the investigation; having already effected a valid stop, the officer could request consent to search the vehicle. *Edmond v. State*, 297 Ga. App. 238, 676 S.E.2d 877 (2009).

Because a concerned citizen reported that a suspected drunk driver was driving a specific vehicle in a specific location, a police officer had a reasonable, articulable suspicion to justify an investigative traffic stop; accordingly, defendant did not show a basis for reversing the trial court's order denying defendant's motion to suppress. *Adcock v. State*, 299 Ga. App. 1, 681 S.E.2d 691 (2009).

Defendant's convictions for trafficking in cocaine and possession of a firearm during the commission of a felony were appropriate because an officer testified that the officer detected the odor of burnt marijuana coming from inside the defendant's vehicle; that the officer retrieved the dog to conduct a free-air sniff; and that after the dog alerted at the vehicle, the officer noticed tears pouring down the defendant's face. The evidence was sufficient to support the finding that the defendant had knowledge of the cocaine in the car and that the defendant was guilty of trafficking in cocaine. *Perkins v. State*, 300 Ga. App. 464, 685 S.E.2d 300 (2009).

Trial court did not err in denying the defendant's motion to exclude evidence obtained as a result of the defendant's detention, specifically the defendants' responses to an officer's questions and the victim's identification of defendant at the scene, because the investigatory stop of the defendant was based on reasonable suspicion arising from a particularized and objective basis for suspecting the defendant of criminal activity. While the victim's description of the assailants was not very specific, the defendant matched the description in build, height, race, and clothing color; with the assistance of a tip from a concerned citizen, the defendant was found at 3:00 or 4:00 A.M. within walking distance of the crime shortly after the crime was committed, within the pe-

rimeter law enforcement officials had established; there were no other pedestrians or traffic in the area; the defendant was out of breath and sweaty despite being underdressed for the weather; and the defendant gave conflicting accounts of where the defendant was coming and going. *Hall v. State*, 309 Ga. App. 179, 710 S.E.2d 146 (2011).

Trial court did not err in denying the defendant's motion to suppress after finding that the excessive-window-tinting statute, O.C.G.A. § 40-8-73.1(b), was unconstitutional because an officer had a reasonable articulable suspicion to justify the traffic stop; the officer observed that the defendant's vehicle had darkly tinted windows and reasonably believed that to be in violation of § 40-8-73.1, and the fact that the statute was later found to be unconstitutional did not render the stop invalid. *Christy v. State*, 315 Ga. App. 647, 727 S.E.2d 269 (2012).

Officer had reasonable suspicion to conduct an investigatory stop of the defendant based on the report of a concerned citizen, who described a suspect involved in illegal drug activity the citizen witnessed and the suspect's location; the officer immediately identified the defendant as matching the description reported by the citizen. *Durden v. State*, No. A12A2556, 2013 Ga. App. LEXIS 154 (Mar. 8, 2013).

#### **Police lacked reasonable suspicion for stop.**

Because a traffic stop of the defendant's vehicle was not based on the commission of a traffic violation or illegal act, but instead was based on the unreliable information provided by a concerned citizen to a police sergeant which amounted to hearsay gleaned from an overheard conversation, and did not provide the officer with the type of "inside information" that would not have been known to the public at large, the defendant's motion to suppress the marijuana seized as a result of the traffic stop was properly granted. *State v. Holloway*, 286 Ga. App. 129, 648 S.E.2d 473 (2007).

An officer who stopped the defendant's vehicle because the officer saw the defendant and a passenger "flailing their arms around pretty aggressively" and thought

that the two were having a heated argument did not have a reasonable suspicion of criminal activity that justified the stop. The officer did not testify that the officer saw any blows being struck, that the officer observed any potential traffic infraction, that either the defendant or the passenger was making threatening gestures, or that the argument was impairing the defendant's ability to drive. *State v. Martin*, 291 Ga. App. 548, 662 S.E.2d 316 (2008).

Denial of suppression was error where there was no valid basis for initiation of a traffic stop of the defendant's vehicle, the further detention of the defendant without evidence of criminal activity was improper, and the defendant's consent to a search was invalid where the consent was not sufficiently attenuated from the taint of the unreasonable stop. *Adkins v. State*, 298 Ga. App. 229, 679 S.E.2d 793 (2009).

**Officer never said to stop running.**—Defendant, upon seeing a police officer, ran away. As the officer never told the defendant to stop running, there was no probable cause to arrest the defendant for obstruction. *State v. Fisher*, 293 Ga. App. 228, 666 S.E.2d 594 (2008).

#### **Vehicle stops.**

Despite the defendant's claim that a sheriff's deputy lacked a specific and articulable suspicion of criminal activity necessary to execute a traffic stop of the defendant's vehicle, and thus that the evidence seized thereafter had to be suppressed, the appeals court found otherwise, as sufficient facts were conveyed to the deputy prior to the stop for the deputy to have a reasonable belief that the defendant was involved in a domestic dispute, and might be under the influence of alcohol thereby justifying a finding that the resulting stop was valid; hence, suppression was properly denied. *Lacy v. State*, 285 Ga. App. 647, 647 S.E.2d 350 (2007), cert. denied, No. S07C1514, 2007 Ga. LEXIS 620 (Ga. 2007).

A traffic stop was justified when officers noticed that a defendant's car had a ten-inch "starburst" crack in its windshield; under O.C.G.A. § 40-8-73(e), a vehicle was not to be operated with a windshield or rear window having a starburst or spider webbing effect greater than

three inches by three inches. *Glenn v. State*, 285 Ga. App. 872, 648 S.E.2d 177 (2007).

When an officer received a call from an off-duty police captain who stated that the captain was following a white pickup truck with dual rear tires that was weaving, and the officer went on the road and in the direction indicated and found such a truck illegally parked in an intersection, the officer was warranted in stopping the truck; that the manufacturer of the truck was not the same manufacturer named by the captain did not, in light of the other circumstances, demonstrate that the intrusion was not reasonably warranted. *Ingram v. State*, 286 Ga. App. 436, 649 S.E.2d 576 (2007).

The trial court did not err in denying the defendant's motion to suppress, despite a claim that an informant used to apprehend the defendant was not previously known to police and had never provided any information until helping in the prosecution of the defendant, because the informant's tip predicted some aspects of the defendant's future behavior and contained information not available to the general public that was corroborated by the observations of officers; moreover, the defendant's reckless driving and flight from a congested parking lot, which caused a short high-speed chase to ensue, and the fact that the police learned that the defendant often carried a gun, provided the officers with an additional basis to stop the defendant and make an arrest. *Patton v. State*, 287 Ga. App. 18, 650 S.E.2d 733 (2007).

Drugs were lawfully seized because the defendant's commission of a traffic offense pursuant to O.C.G.A. § 40-2-6.1 allowed an officer to make a valid traffic stop of the defendant's vehicle and thus allowed the officer to ask for consent to search and use a drug-sniffing dog to sniff the exterior of the vehicle. Thus, the defendant's motion to suppress was properly denied. *Thomas v. State*, 289 Ga. App. 161, 657 S.E.2d 247 (2008), cert. dismissed, No. S08C0959, 2008 Ga. LEXIS 491 (Ga. 2008).

Because an officer was authorized to stop vehicles for traffic violations under both the Fourth Amendment and the Georgia Constitution, it was proper for

the officer to stop the defendant, whose vehicle bore the license plate of another vehicle in violation of O.C.G.A. § 40-2-6. *Thompson v. State*, 289 Ga. App. 661, 658 S.E.2d 122 (2007).

Because the defendant committed a traffic violation by crossing a solid yellow line in the roadway, and was not legitimately faced with an obstruction, despite claiming that it was undoubtedly convenient to pass the slow moving van driving ahead, a police officer had a reasonable and articulable suspicion to initiate a traffic stop of the defendant's vehicle; thus, the trial court properly denied the defendant's motion to suppress the evidence seized as a result of said stop. *Przyjemski v. State*, 290 Ga. App. 22, 658 S.E.2d 807 (2008).

Traffic stop of defendant was justified when an officer saw defendant's car hit a large pothole, which the officer testified a car could not hit if it were entirely within its lane; even if the officer's honest belief that a traffic violation had occurred was incorrect, the officer's decision to stop defendant was made in good faith and was not unreasonable or harassing. *Camacho v. State*, 292 Ga. App. 120, 663 S.E.2d 364 (2008), cert. denied, No. S08C1769, 2008 Ga. LEXIS 872 (Ga. 2008).

In a driving under the influence case, there was no merit to the defendant's argument that an officer lacked articulable suspicion to stop the defendant's vehicle. Testimony that the defendant was swerving showed that the defendant was not stopped because of mere inclination, caprice, or harassment, and the trial court accepted the officer's testimony that the full extent of the defendant's actions was not reflected on a video shown to the jury. *Hann v. State*, 292 Ga. App. 719, 665 S.E.2d 731 (2008).

An officer in an unmarked car who had been following the defendant based on a tip that the defendant was transporting methamphetamine was authorized to stop the defendant under the Fourth Amendment and the Georgia Constitution after the officer saw the defendant illegally cross the center line. *Sapp v. State*, 297 Ga. App. 218, 676 S.E.2d 867 (2009).

There was reasonable suspicion to stop the defendant's vehicle. The defendant

was the only person who had been in physical contact with a drug dealer whom police were watching; the defendant took a package from the dealer; and a search of the dealer's car indicated that the dealer no longer had the drugs, giving rise to a reasonable suspicion that the defendant possessed the drugs. *Garza v. State*, 298 Ga. App. 332, 680 S.E.2d 175 (2009).

When the only evidence to support a traffic stop was that defendant's car was in front of a residence that had been previously raided by the police, this did not constitute an objective manifestation that defendant was, or was about to be, engaged in criminal activity sufficient to warrant the intrusion of a traffic stop. *Pritchard v. State*, 300 Ga. App. 14, 684 S.E.2d 88 (2009).

Trial court did not err in denying the defendants' motions to suppress drug evidence because the defendants failed to establish that the actions of the arresting officer unreasonably expanded the scope or duration of the traffic stop; because the officer's suspicions were piqued by observations of a truck's condition, the strong scent of perfume emanating from the cab, the demeanor of one the defendants, and the other defendant's responses to the officer's brief questioning, the officer was then prompted and authorized to request a K-9 unit and to run criminal histories on both defendants, and there was no evidence to suggest that the officer delayed in making either query. *Young v. State*, 310 Ga. App. 270, 712 S.E.2d 652 (2011).

Officer had a sufficient basis for initiating a stop of the defendant's vehicle after a computerized database linked an individual with an active arrest warrant to the car the defendant was driving; while the occupants were female, and not the male subject of the warrant, once stopped, the officer was permitted to request the defendant's driver's license. Thus, the defendant's motion to suppress was properly denied. *Rodriguez v. State*, No. A12A2397, 2013 Ga. App. LEXIS 72 (Feb. 19, 2013).

**Primary purposes for roadblock.** —

A roadblock was constitutional when its primary purposes were to check for driver's licenses, insurance, and impaired drivers and when its secondary purposes were to check tags, observe seat belt use,

and check the safe condition of vehicles. The fact that officers were checking for multiple violations did not make the primary purposes invalid. *Kellogg v. State*, 288 Ga. App. 265, 653 S.E.2d 841 (2007), cert. denied, No. S08C0458, 2008 Ga. LEXIS 229 (Ga. 2008).

**Testimony about implementation and purposes of roadblock established by multiple agencies.** — To show the constitutionality of a roadblock set up by city police, county police, and the state highway patrol, it was not necessary that officers from all three jurisdictions testify about its implementation and primary purpose. Testimony from a city officer that the officer was the primary supervisor at the roadblock and in which the officer addressed these matters sufficed to meet the evidentiary requirements. *Kellogg v. State*, 288 Ga. App. 265, 653 S.E.2d 841 (2007), cert. denied, No. S08C0458, 2008 Ga. LEXIS 229 (Ga. 2008).

**Continued detention after traffic stop.** — A deputy who asked to search the defendant's vehicle had a reasonable suspicion to warrant the defendant's continued detention after a warning citation was issued pursuant to a traffic stop; the deputy testified that both the defendant and the defendant's sibling were extremely nervous, especially the sibling while reaching into the glove compartment to get the vehicle's registration, and the two gave conflicting stories as to their destination. *Medvar v. State*, 286 Ga. App. 177, 648 S.E.2d 406 (2007).

On appeal from a conviction for possession of cocaine with intent to distribute, the court held that despite the fact that the police were authorized to conduct a brief investigatory stop of the defendant's vehicle, the resulting detention beyond that authorized as a Terry stop evolved into an illegal arrest. Hence, the evidence seized thereafter became the fruit of the poisonous tree and should have been suppressed. *Grandberry v. State*, 289 Ga. App. 534, 658 S.E.2d 161 (2008).

Trial court did not err in denying the defendant's motion to suppress evidence obtained at a roadblock after finding that the defendant's detention by the officers was not excessive because the trial court was authorized to conclude that the brief

detention of the defendant was neither unreasonable nor illegal; the trial court's findings that the arresting officer detained the defendant for 20 minutes after the initial portable breath test to conduct an additional test and that the 20 minute delay was for the defendant's benefit to insure that the portable alcohol test was not affected by residual alcohol due to the defendant's recent consumption of alcoholic beverages were supported by the evidence. *Owens v. State*, 308 Ga. App. 374, 707 S.E.2d 584 (2011), cert. denied, No. S11C1036, 2011 Ga. LEXIS 498 (Ga. 2011).

Trial court erred in denying the defendant's motion to suppress evidence deputies seized from the defendant's car because the deputies did not have reasonable grounds upon which to continue to detain the defendant after the deputies called for a drug dog; the state offered no evidence that the deputies still were investigating the defendant's failure to properly signal a right turn when the deputies called for a canine unit to come to the scene and detained the defendant until the dog arrived or that the deputies had a reasonable suspicion that the defendant was involved in some criminal activity besides the traffic violation when the deputies called for the drug dog and continued to detain the defendant until the dog arrived and sniffed the car. *Dominguez v. State*, 310 Ga. App. 370, 714 S.E.2d 25 (2011).

Police officer impermissibly extended a traffic stop without specific and articulable facts to warrant the detention; while the officer observed nervousness in the defendant, that was not sufficient to extend the stop and there was no other evidence from which the officer could have formed reasonable and articulable suspicion of illegal activity. *Weems v. State*, 318 Ga. App. 749, 734 S.E.2d 749 (2012).

**Stop of vehicle not unreasonably prolonged.** — Trial court did not err in denying the defendant's motion to suppress evidence a police officer recovered from the defendant's vehicle because the evidence supported the trial court's finding that the officer did not unreasonably prolong the stop of the vehicle, and once the drug dog alerted to the vehicle, the

officer had probable cause to search the vehicle; a brief detention was authorized because it was reasonable for the officer to be suspicious in light of the defendant's furtive movement at the initial point of the stop, and that suspicion was heightened when the defendant attempted to explain that the defendant was looking for the defendant's wallet but then retrieved the defendant's license from a different part of the car, and when the defendant revoked the defendant's consent to search. *Hardaway v. State*, 309 Ga. App. 432, 710 S.E.2d 634 (2011).

#### **Tipster.**

Because the trial court found that officers acting on an anonymous tip that marijuana was being grown at the defendant's residence were within their rights when they saw marijuana from the adjoining property, when they smelled marijuana from the driveway, and when they went to both the front and the back doors of the house in an attempt to make contact with someone, and the grounds given in the affidavit supporting a search warrant application were wholly unconnected with the defendant's arrest and the two protective sweeps, the trial court did not err in denying the defendant's motion to suppress. *Padgett v. State*, 287 Ga. App. 789, 653 S.E.2d 102 (2007), cert. denied, No. S08C0415, 2008 Ga. LEXIS 209 (Ga. 2008).

Because the information provided by a confidential informant was reliable and substantially corroborated by police officers, probable cause to search the defendant existed; accordingly, because the warrantless search was authorized with or without defendant's consent, there was no basis to suppress the drug evidence found on the defendant's person. *Hall v. State*, 310 Ga. App. 397, 714 S.E.2d 7 (2011).

#### **Exigent circumstances found.**

Because sufficient exigent circumstances existed to authorize a sheriff's deputy to enter the defendant's backyard and seize a number of animals the officer observed were malnourished and mistreated, and given the harsh weather conditions and impending holiday, obtaining a warrant would have been unreasonable, the defendant's motions to suppress and

in limine seeking to preclude admission of the evidence seized were properly denied. Moreover, the evidence seized after the defendant's lawful arrest, and observed in plain view by the officer upon being allowed to enter the defendant's residence, was also properly admitted. *Morgan v. State*, 289 Ga. App. 209, 656 S.E.2d 857 (2008).

Contrary to the defendant's argument, the trial court did not err in failing to grant the defendant's motion for a directed verdict of acquittal in the defendant's trial for obstruction of a law enforcement officer, O.C.G.A. § 16-10-24(a), based on the defendant's claim that the defendant was entitled to resist an unlawful search of the defendant's premises; among other things, exigent circumstances existed to justify the officers' warrantless entry onto the defendant's property because officers observed that the defendant's dogs did not have their required rabies tags, and further investigation, including the capturing of the animals, was necessary to protect the public against a risk of rabies. *Jarvis v. State*, 294 Ga. App. 482, 669 S.E.2d 477 (2008).

Trial court did not err in denying the defendant's motion to suppress photographs obtained subsequent to police officers' entry into the defendant's home because the officers' entry was authorized by the exigent circumstances exception to the warrant requirement of the Fourth Amendment; the trial court was authorized to find that the age of the defendant's children, the children's undisputed inability to care for themselves, and the lack of adult supervision due to the defendant's absence and their father's arrest constituted an exigent circumstance that authorized the officers' entry into the residence for the purpose of temporarily supervising the children until a responsible adult arrived to relieve the officers, and once the officers were legally in the house pursuant to the exigent circumstances, the officers were authorized to photograph items of potential evidentiary significance that were in plain view, specifically, the family's living conditions. *Staib v. State*, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Trial court did not err in admitting into evidence the murder weapon and photo-

graphs of the crime scene because the search of the defendant's residence was authorized due to the exigent circumstances; officers arrived at the residence to conduct a welfare check and knocked on the door, which caused the door to open slightly, allowing the officers to see the victim lying motionless on the couch, and after the victim failed to respond to the officers' calls, the officers were authorized to proceed into the residence immediately to come to the victim's aid. *Gibson v. State*, 290 Ga. 6, 717 S.E.2d 447 (2011).

#### **Probable cause shown.**

Given the evidence that the defendant was unable to offer a credible explanation for being on the grounds of a housing project, and failed to provide a law enforcement officer with a clear answer when asked about the ownership of a car the defendant had been leaning on, the officer had probable cause to make a warrantless arrest of the defendant for loitering; thus, the trial court properly denied the defendant's motion to suppress the evidence seized as a result of said arrest. *Boyd v. State*, 290 Ga. App. 34, 658 S.E.2d 782 (2008).

There was no merit to a defendant's argument that the trial court should have suppressed evidence because police lacked probable cause for the defendant's arrest. Officers knew that within minutes of a carjacking, three people matching an eyewitness's description were seen in the vicinity of the crime driving vehicles also matching the eyewitness's description; the suspects were followed by police until the suspects abandoned their vehicles and fled across a highway and through a muddy, overgrown area; almost immediately, the officers found the defendant on the other side of the highway, at a closed business, with muddy shoes and debris on the defendant's clothes, sweating profusely; the defendant generally matched the description given of one of the fleeing suspects; and the defendant could not give a logical explanation for the defendant's presence at that location. *Daugherty v. State*, 291 Ga. App. 541, 662 S.E.2d 318 (2008), cert. denied, 2008 Ga. LEXIS 792 (Ga. 2008).

## **2. Searches**

**Plain view.** — No abuse of discretion resulted from the admission of similar

transaction evidence because the state established a sufficient similarity between the crimes charged and the similar transaction; and the defendant failed to show that the evidence in the similar transaction was obtained as a result of an illegal search and seizure, as the officer involved in the seizure did so through a lawful non-search plain view situation. *Sherrer v. State*, 289 Ga. App. 156, 656 S.E.2d 258 (2008), cert. denied, 2008 Ga. LEXIS 391 (Ga. 2008).

**Photographs of items in plain view.**

— Juvenile court did not err by admitting photographs of a parent's home during deprivation proceedings because premitting whether a purported violation of the Fourth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para XIII would preclude the admission of photographs in a child deprivation action, police officers were authorized to take photographs of items observed in plain view as long as the officer was in a place where he or she was entitled to be; even assuming that the admission of the photographs was erroneous, the parent failed to show that the parent was harmed thereby in light of the remaining evidence supporting the juvenile court's determination that the children were deprived. In the Interest of R. C. H., 307 Ga. App. 774, 706 S.E.2d 686 (2011).

**Search of curtilage.**

Trial court properly granted defendants' motions to suppress evidence of drugs and drug paraphernalia found at the residence owned by one defendant as officers had already learned that the person they were looking for stayed at a trailer next door, and thus officers engaged in impermissible search of the curtilage when officers found a bag of drugs 45 feet from defendants' house; as a result, all evidence seized in course of subsequent searches of the property was obtained as a direct result of the impermissible intrusion into the curtilage and had to be suppressed as fruit of the poisonous tree. *State v. Gravitt*, 289 Ga. App. 868, 658 S.E.2d 424 (2008).

**Continued detention when driver unable to produce driver's license.** — Trial court did not err in denying the defendant's motion to suppress when a

police officer was authorized to stop the vehicle the defendant was driving because of a perceived traffic violation and to continue the officer's investigation because the defendant did not have a driver's license; the particularized and objective basis for the initial stop was the information from the Georgia Crime Information Center that the male owner of the registered vehicle defendant was operating had a suspended driver's license, and once the stop was made, and it was ascertained that the defendant was not the owner of the car, the officer had a duty to further investigate only because defendant could not produce a driver's license. *Humphreys v. State*, 304 Ga. App. 365, 696 S.E.2d 400 (2010).

**Search of passengers on commercial bus.** — Trial court properly denied a defendant's motion to suppress evidence of drugs found in a bag that the defendant acknowledged belonged to the defendant during a bus search conducted by the Motor Carrier Compliance Division of the Georgia Department of Motor Vehicle Safety as the defendant was not in custody when the defendant answered an officer's questions that the bag belonged to the defendant and that the officer could search the bag. As a result, no seizure under the Fourth Amendment occurred, and it was not necessary for the officer to advise the defendant of the defendant's Miranda rights since no arrest or seizure took place. *Solano-Rodriguez v. State*, 295 Ga. App. 896, 673 S.E.2d 351 (2009).

**Seizure invalid where intrusion into curtilage without probable cause.**

Because the seizure of cash found on the defendant's person was conducted based on a lawful arrest for a domestic violence act of assault, given information by the defendant's girlfriend, the girlfriend's obvious injuries, and the defendant's attempt to flee, the trial court properly denied suppression of the evidence; however, because the defendant maintained a reasonable expectation of privacy in the curtilage surrounding the defendant's residence, absent a warrant or exigent circumstances, suppression of cocaine found in that area was erroneously denied. *Rivers v. State*, 287 Ga. App. 632, 653 S.E.2d 78 (2007).

**Consent to search invalid.**

The trial court properly granted the defendant's motion to suppress evidence seized by law enforcement which showed that the first officer on the scene lacked a particularized and objective basis for suspecting that the defendant was involved in criminal activity, and after a back-up officer arrived, neither officer was placed in fear of their safety by the defendant's actions; thus, the first officer's acts of detaining the defendant and asking for consent to search were unlawful. *State v. Lanes*, 287 Ga. App. 311, 651 S.E.2d 456 (2007), cert. denied, 2008 Ga. LEXIS 85 (Ga. 2008).

**Search of lost wallet.** — A trial court erred in denying defendant's motion to suppress the drug evidence found in defendant's wallet, which defendant lost at a concert, and the shell of a plastic pen in defendant's pocket after being searched, since by losing the wallet and not abandoning the wallet, the defendant never lost the expectation of privacy regarding the wallet. *Wolf v. State*, 291 Ga. App. 876, 663 S.E.2d 292 (2008).

**Search of purse during booking process.** — Upon the defendant's arrest based on a warrant for failure to appear, the defendant was subject to being transported to jail for booking and the trial court did not err in concluding that the contents of the defendant's purse would have been inevitably discovered as part of the booking process associated with the defendant's lawful arrest. *Schweitzer v. State*, 319 Ga. App. 837, 738 S.E.2d 669 (2013).

**Search of desk at work.** — A trial court erred by failing to suppress the evidence seized by the police from defendant's desk at work and concluding that no warrant was required for the search of the desk because it was unlocked and was in a workspace shared by numerous co-workers. A warrant was required for the search of the desk and, since the warrant authorizing the search was issued without a showing of probable cause based on the tip of an unidentified caller, and there was no exception to the warrant requirement shown, the fruits of the search of the desk had to be suppressed. *Harper v. State*, 283 Ga. 102, 657 S.E.2d 213 (2008).

**Search of vehicle of corrections officer in prison parking lot.** — Trial court properly denied a motion to suppress filed by the defendant, a corrections officer, whose car was searched after a drug-detecting dog alerted in the parking lot of the prison where the defendant worked. Signs posted outside the prison informed those entering that they would be subject to search once inside the guard line; by driving onto the premises, the defendant consented to such a search. *Bradley v. State*, 292 Ga. App. 737, 665 S.E.2d 428 (2008).

**Roadblocks.**

Because a form document, entitled the "Henry County Police Department Roadblock & Safety Checkpoint Record," introduced at a motion to suppress hearing by the state was properly admitted as a business record under former O.C.G.A. § 24-3-14 (see now O.C.G.A. § 24-8-803), and the testimonial evidence regarding the primary purpose of the roadblock passed constitutional muster, in that it was legitimately conducted as part of a statewide "zero tolerance" campaign, the defendant's motion to suppress the evidence seized as a result was properly denied. *Yingst v. State*, 287 Ga. App. 43, 650 S.E.2d 746 (2007).

Trial court did not err by denying the defendant's motion to suppress evidence obtained during a traffic stop because there was some evidence that the defendant attempted to avoid a roadblock; the defendant made an immediate, sudden turn into a driveway, reversed course, and drove away from the checkpoint at the same time that the police officer noticed the defendant's headlights. *Blakely v. State*, 316 Ga. App. 213, 729 S.E.2d 434 (2012).

Motion to suppress evidence obtained at a highway roadblock was properly denied because the supervisory officer did not lose supervisory status while assisting subordinates when traffic was backed up, and the officer's uncontradicted testimony that the officer was expressly authorized to plan and implement roadblocks was sufficient to establish supervisory authority. *Williams v. State*, 317 Ga. App. 658, 732 S.E.2d 531 (2012).

**Search held contemporaneous to arrest.**

Trial counsel did not render ineffective assistance by failing to move to suppress evidence found on the defendant's person because any motion to suppress would have been without merit; when the officers lawfully approached and questioned the defendant, the smell of alcohol on the defendant's person and emanating from a cup, and the officers' earlier observations of the defendant staggering and stumbling in the middle of the roadway, gave the officers probable cause to arrest the defendant for unlawfully walking upon the roadway while under the influence of alcohol, O.C.G.A. § 40-6-95, and the cocaine and digital scales subsequently found in the defendant's pockets were discovered pursuant to a lawful search incident to an arrest. *White v. State*, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

**Search of vehicle following arrest not improper.** — Although there may have been technical violations of former O.C.G.A. § 40-5-121(b)(1) in an officer's arrest of a driver for driving with a suspended license, the driver's statement that his license was suspended provided the officer with probable cause to arrest, and any violation of § 40-5-121(b)(1) did not render subsequent search of van improper. *Agnew v. State*, 298 Ga. App. 290, 680 S.E.2d 141 (2009).

**Passenger had standing to contest seizure and detention.** — Because the passenger had standing to contest the passenger's own allegedly illegal seizure and detention in connection with a traffic stop, and because evidence or contraband discovered in a search of the car during the traffic stop could be considered the fruits of the passenger's illegal detention, the passenger could move to suppress the evidence or contraband and could thus indirectly challenge the search of the car. *State v. Menezes*, 286 Ga. App. 280, 648 S.E.2d 741 (2007).

**Pat-down search held proper.** — The trial court did not err in denying the defendant's motion to suppress the evidence seized by law enforcement, given the totality of the circumstances presented, including: (1) an anonymous tip; (2) the two responding officers' personal

observations of the defendant's actions at the scene; and (3) their brief investigative detention of the defendant; thus, a pat-down of the defendant's outer clothing was reasonable. *Carter v. State*, 287 Ga. App. 597, 651 S.E.2d 759 (2007), cert. denied, 2008 Ga. LEXIS 172 (Ga. 2008).

An officer was justified in being concerned for the officer's safety and in conducting a pat-down search of the defendant based upon the officer's observations of the defendant's earlier behavior of repeatedly tugging at the defendant's waistband to pull up the defendant's sagging pants, the bulge in the defendant's waistband that appeared to be a pistol grip, and the defendant's actions of raising the defendant's left hand and reaching toward that bulge when the officer approached the defendant. *Davis v. State*, 290 Ga. App. 1, 658 S.E.2d 788 (2008).

Trial court did not err in denying the defendant's motion to suppress because the search of the defendant's pockets was valid; the officers had a particularized and objective basis for suspecting that the defendant was involved in criminal activity, and because the pat-down was brief, yielded no evidence, and was not a basis for the further investigative detention, it did not taint the defendant's subsequent consent to the search of the pockets. *Mwangi v. State*, 316 Ga. App. 52, 728 S.E.2d 729 (2012).

Trial court did not err in denying the defendant's motion to suppress because the initial encounter was a first-tier encounter requiring no suspicion since the defendant was already stopped and the officer did not block the defendant's vehicle, activate the blue lights, or otherwise indicate that the defendant was unable to leave; the subsequent pat-down was proper because the pat-down was performed pursuant to the defendant's consent, which the defendant freely gave when requested by the officer. *Kirkland v. State*, 316 Ga. App. 310, 728 S.E.2d 907 (2012).

**Pat-down search held improper.**

When a defendant was asked to leave a car and was patted down while a warrant was being served on the driver, the Terry pat-down was unconstitutional when the officer who conducted the pat down ac-

knowledge that the officer had no reason to believe that the defendant was armed but that it was the officer's general practice to pat down anyone the officer asked to leave a car. Accordingly, drugs discovered as a result of the pat-down should have been suppressed. *Teal v. State*, 291 Ga. App. 488, 662 S.E.2d 268 (2008).

Trial court erred in denying the defendant's motion to suppress a gun police officers found on the defendant's person because although the officers had a sufficient basis for a brief initial Terry stop since the defendant partially fit the description given by the victim of the person who attacked the victim, the officers had no authority to conduct the pat-down that discovered the weapon on the defendant's person; the fact that the officers suspected that the defendant could have been the one that assaulted the victim did not reasonably give rise to a belief that the defendant was armed and a threat to the officers, and because the record revealed no proof of other circumstances known to the officers when the officers commenced the frisk that would lead a reasonable officer to conclude that the defendant had a weapon or instrument capable of being used as a weapon on the defendant's person, the state did not carry the state's burden of proving the propriety of the search. *Daniels v. State*, 307 Ga. App. 216, 704 S.E.2d 466 (2010).

**Pat-down search exceeded permissible scope.** — Because the state introduced no evidence that the defendant consented to an officer's opening of a matchbox retrieved from the defendant's pants, the officer was not concerned that a weapon was hidden in the box, and the box was not readily identifiable as contraband, the search of the defendant's person exceeded the permissible scope of a pat-down for weapons, requiring suppression of the cocaine found inside the matchbox. *Mason v. State*, 285 Ga. App. 596, 647 S.E.2d 308 (2007).

**Third-tier detention.** — Trial court erred in finding that a narcotics investigator only escalated an encounter to a second-tier detention by using a neck restraint maneuver and ordering the defendant to spit out what was in the defendant's mouth because by placing the

defendant in a neck restraint and ordering the defendant to spit out the baggy, the investigator escalated the encounter to a third-tier detention requiring a showing of probable cause; thus, the trial court erred in treating the encounter as a second-tier detention requiring only a showing of reasonable suspicion. *Lewis v. State*, 317 Ga. App. 391, 730 S.E.2d 757 (2012).

**Pat-down of pocket of coat found hanging in hotel.** — Marijuana was properly seized from the pocket of a coat hanging outside the bathroom door in the defendant's hotel room; the officer who needed to enter the closed bathroom was justifiably concerned for safety and was worried if a bulge in the coat was a gun. A pat-down of the coat pocket was a reasonable step, and the officer was authorized to seize a baggie found in the pocket. *Johnson v. State*, 285 Ga. 571, 679 S.E.2d 340 (2009).

**Search incident to arrest.**

Officer's search of the defendant's vehicle incident to the defendant's arrest was lawful because the crime of arrest was the possession of bagged marijuana in the defendant's pocket, and it was reasonable to believe that evidence relevant to the offense could be found in the vehicle from which the defendant exited. *Kirkland v. State*, 316 Ga. App. 310, 728 S.E.2d 907 (2012).

**Probable cause existed to search passenger.** — It was error to suppress evidence seized pursuant to a search of the car in which the defendant had been a passenger on the ground that the driver had not voluntarily consented to the search; an officer was authorized to make a traffic stop because of a traffic violation, and after the stop, the occupants' behavior and visible drug paraphernalia gave the officer probable cause to search the car. *State v. Menezes*, 286 Ga. App. 280, 648 S.E.2d 741 (2007).

**Search after stop for seat belt violation authorized.** — Because sufficient evidence existed to support a finding that the arresting officer had a clear and unobstructed view of the defendant not wearing a seat belt as required by O.C.G.A. § 40-8-76.1(f), the officer's subsequent stop of the defendant's vehicle was sup-

ported by probable cause, making suppression of the evidence thereafter seized unwarranted. *Schramm v. State*, 286 Ga. App. 156, 648 S.E.2d 392 (2007).

**Motion to suppress properly denied.**

Because the totality of the circumstances known to the law enforcement officers participating in the drug investigation and the undercover purchase of narcotics supplied sufficient probable cause that contraband would be found inside the vehicle the defendant was driving, suppression of the drug evidence seized during the search of this vehicle was properly denied. *Stroud v. State*, 286 Ga. App. 124, 648 S.E.2d 476 (2007).

Trial court did not err in denying the defendant's motion to suppress as officers could lawfully search the interior of the defendant's car. A sergeant who had received a report of a speeding car had a reasonable and articulable suspicion of criminal activity having occurred, and after the defendant fled and disobeyed an order to stop, a second officer had probable cause to arrest the defendant for obstruction following which the car interior could be lawfully searched under O.C.G.A. § 17-5-1. *Spence v. State*, 295 Ga. App. 583, 672 S.E.2d 538 (2009).

Trial court did not err in denying the defendant's motion to suppress cocaine a detective found in the defendant's pocket because the defendant's presence on the premises being searched and defendant's apparent attempt to flee from the premises provided probable cause for the detective to believe that the defendant possessed or was, at least, a party to the crime of possessing, the unlawful contraband specified in the warrant, which authorized the detective to detain defendant and to conduct a warrantless search of the defendant's person. *Sheats v. State*, 305 Ga. App. 475, 699 S.E.2d 798 (2010).

Trial court did not err in denying the defendant's motion to suppress marijuana a police officer found in a vehicle in which the defendant was a passenger because the defendant was legally detained when the officer sought the driver's consent to search, and the officer made the officer's request shortly after completing the officer's check of the occupants' identification,

which was within six minutes of initiating the stop; having found that the defendant was not subject to an illegal detention, the trial court did not err in further concluding that the defendant lacked standing to challenge the search on other grounds. *Baker v. State*, 306 Ga. App. 99, 701 S.E.2d 572 (2010).

Trial court did not err in denying the defendants' motion to suppress evidence police officers seized pursuant to search warrants for a residence and vehicles and a traffic stop because all of the facts, taken together, justified the stop based on a reasonable articulable suspicion that the occupants of the vehicles were involved in an active marijuana growing operation; a search warrant for the residence was pending based on probable cause to believe that an active marijuana growing operation was being conducted inside, the officers had information from multiple sources that the residence was a marijuana grow house, the house exhibited the physical characteristics of other grow houses that had been recently discovered, and the officers observed the defendants driving away from the residence in tandem with a truck and large recreational trailer, which had been obscured in the backyard behind a privacy fence. *Prado v. State*, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Because an inventory search of a codefendant's vehicle after impoundment was reasonable, and because the search was performed incident to the codefendant's lawful arrest, there was no basis to suppress the evidence seized from the search. *Williams v. State*, 308 Ga. App. 464, 708 S.E.2d 32 (2011).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer obtained through a traffic stop of a driver's vehicle because the stop of the defendant and the driver was valid since the officer's observation that the vehicle was traveling 40 miles per hour in a 35-mile-per-hour zone authorized the officer to initiate the traffic stop, and the officer was on the lookout for the vehicle based on information relayed by the county drug squad; the stop was not illegally extended because it did not matter whether the request to search came dur-

ing the traffic stop or immediately thereafter, and there was no illegal detention since the questioning was almost instantaneous, all indications were that the search of the vehicle was by consent of the driver. *Hammont v. State*, 309 Ga. App. 395, 710 S.E.2d 598 (2011).

Trial court did not err in denying the defendant's motion to suppress because an officer did not extend the duration of a traffic stop; the officer's testimony supported the conclusion that the officer asked for consent to search during the time that the officer was issuing citations, and the officer's questioning did not extend the duration of the defendant's detention. *Arroyo v. State*, 309 Ga. App. 494, 711 S.E.2d 60 (2011).

Trial court did not err in denying the defendant's motion to suppress because the evidence provided sufficient reasonable articulable suspicion to support a brief detention of the defendant; an officer had a particularized and objective basis for suspecting that the defendant was involved in criminal activity when the officer told the defendant to leave a residence because the officer was aware that the owner of the residence was known for dealing narcotics from a number of prior cases the officer had personally worked on, and the officer believed that the defendant was at the residence to buy marijuana. *Hilbun v. State*, 313 Ga. App. 457, 721 S.E.2d 656 (2011).

Trial court properly denied the defendant's motion to suppress, as the officer was authorized to initiate the traffic stop after observing the defendant's seat belt violation and was thereafter authorized to make a reasonable inquiry and investigation. After learning that the defendant did not have a valid driver's license, the officer had probable cause to arrest the defendant and after observing the defendant reach into a pocket, retrieve a plastic bag, and attempt to conceal the bag, the officer had probable cause to search the vehicle for contraband. *Horne v. State*, 318 Ga. App. 484, 733 S.E.2d 487 (2012).

Defendant's motion to suppress was properly denied when the officer's stop of the defendant was based on the officer's reasonable articulable suspicion that the defendant was operating a bicycle in vio-

lation of O.C.G.A. § 40-6-296(a), and marijuana was discovered in a bag on the handlebars of the bicycle during the stop, which was not unreasonably prolonged. *Bolen v. State*, 320 Ga. App. 3, 739 S.E.2d 11 (2013).

#### **Probable cause for arrest.**

The trial court did not err in failing to suppress all the evidence discovered as a result of the defendant's arrest because the arresting officer had probable cause to make an arrest for DUI. *Caraway v. State*, 286 Ga. App. 592, 649 S.E.2d 758 (2007), cert. denied, 2007 Ga. LEXIS 686 (Ga. 2007).

A deputy had probable cause to arrest a defendant for DUI independent of field sobriety tests; when the deputy arrived on the scene and before the deputy conducted the tests, the deputy was told by another officer that the defendant had been driving on the wrong side of the road and had been drinking, the deputy noticed that the defendant was unsteady and nervous and smelled strongly of alcohol, and the defendant admitted to having been drinking two or three hours before. *Tune v. State*, 286 Ga. App. 32, 648 S.E.2d 423 (2007).

Officer had probable cause to believe that, by lying about whether weapons were in a vehicle, the defendant had violated O.C.G.A. § 16-10-20 because, at the time the defendant produced the rental agreement for the vehicle, the officer saw a firearm in the center console of the rental car, which the defendant apparently tried to conceal by quickly closing the console; when the officer asked the defendant whether any weapons were in the car, the defendant denied it, and that was a reason for the officer to detain the defendant and to secure the firearm for the officer's own safety. *Culpepper v. State*, 312 Ga. App. 115, 717 S.E.2d 698 (2011).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer recovered from a rental car because the officer had reasonable grounds for detaining the defendant since the officer found the defendant and a friend in the parking lot of a closed business late at night, knew that several burglaries and thefts had occurred in the area recently, and observed that the defendant

and the friend appeared to be nervous when the officer spoke with them; in the course of securing a firearm the officer saw a firearm in the center console of the rental car, the officer saw in plain view a digital scale with white residue, affording the officer probable cause to effect a custodial arrest of the defendant. *Culpepper v. State*, 312 Ga. App. 115, 717 S.E.2d 698 (2011).

**Motion to suppress improperly denied.**

Trial court should have suppressed evidence recovered from the defendant's car and home after the defendant's arrest because the defendant had been removed from the car and handcuffed before police searched the car and, thus, the search was not required for the safety of the officers, and the search of the defendant's home pursuant to a search warrant obtained on the basis of the illegal items seized from the defendant's car was "fruit of the poisonous tree." *Hargis v. State*, 319 Ga. App. 432, 735 S.E.2d 91 (2012).

**Motion to suppress improperly granted.** — The trial court erroneously granted suppression of the evidence seized in a traffic stop involving two defendants in which an officer, after arresting the first defendant for obstruction, searched the car and found a substance which a field test showed to be cocaine, as the stopping officer was authorized to make the stop based on a violation of O.C.G.A. § 40-6-202 and because the officer could search the passenger compartment of the car incident to the arrest of the first defendant. *State v. Stafford*, 288 Ga. App. 309, 653 S.E.2d 750 (2007), *aff'd*, 284 Ga. 773, 671 S.E.2d 484 (2008).

With regard to defendant's conviction for trafficking in methamphetamine, defendant failed to establish that defense counsel was ineffective for failing to pursue a motion to suppress the evidence found in defendant's room as the evidence showed that a preliminary motion to suppress was filed and that trial counsel concluded that, based on the Fourth Amendment waivers of defendant and others involved, pursuit of the motion would have been fruitless. *Corn v. State*, 290 Ga. App. 792, 660 S.E.2d 782 (2008).

Trial court erred in granting a defen-

dant's motion to suppress crack cocaine police officers found in the defendant's pants' pocket during a pat-down search because the officers made a valid Terry stop, and the defendant was not free to leave; the undisputed testimony from the officers was that based on the officers' experience, outside window tinting was often performed on stolen cars, defendant and other men were working on a car in a vacant lot, the car had no tag, and the men were gathered around the car in a way that could be construed as trying to conceal a stolen automobile. *State v. Miller*, 300 Ga. App. 55, 684 S.E.2d 80 (2009).

Trial court erred in granting the defendant's motion to suppress evidence resulting from a police officer's search and seizure because, although the defendant was subjected to a tier-two Terry-type investigative detention, the defendant was not in custody, and the defendant was detained for a reasonable time to investigate in conjunction with the valid stop, and the officer's question regarding whether the defendant was in possession of contraband occurred within a few seconds of the stop, such that no reasonable person could believe that they were under arrest and that they were not free to leave after the officer had been afforded a reasonable time to finish conducting a traffic investigation. *State v. Hammond*, 313 Ga. App. 882, 723 S.E.2d 89 (2012).

**Probable cause for stop.**

Proper basis existed for an investigative stop as a police officer was given a description of the vehicle used by the perpetrators of an armed robbery, which matched that of the defendant's vehicle; a protective sweep of the vehicle, which revealed, *inter alia*, a handgun, was justified as the crime was committed at gunpoint. *Billingsley v. State*, 294 Ga. App. 661, 669 S.E.2d 699 (2008).

**No justification for stop.** — Trial court properly granted the defendant's motion to suppress evidence a deputy sheriff obtained in the course of a traffic stop because the court found that the deputy did not really believe at the time of the stop that the absence of side view mirrors supplied proper grounds for a stop and that the deputy did not, in fact, see

anyone toss anything from the car were not clearly erroneous; the factual findings were based not only upon a video that was absent from the record on appeal but also upon an assessment of the credibility of the deputy. *State v. Reid*, 313 Ga. App. 633, 722 S.E.2d 364 (2012).

**No probable cause when defendant could not identify owner of vehicle.** —

An officer improperly arrested a defendant for sitting in a car, the owner of which the defendant could not identify. As the officer had no report of a stolen vehicle, nor was there any evidence that the vehicle had been broken into, the officer had no probable cause to remove the defendant from the vehicle and arrest the defendant; therefore, evidence consequently discovered in the vehicle was illegally obtained and properly suppressed. *State v. Fisher*, 293 Ga. App. 228, 666 S.E.2d 594 (2008).

**Entry into car upheld after officer saw object in plain view.** —

Based on an unusual metal pipe an officer saw through a defendant's window after the officer made a traffic stop, its resemblance to other pipes the officer knew to be used to smoke marijuana, the officer's experience in a drug interdiction unit, and the defendant's nervous behavior, the officer was authorized to enter the defendant's vehicle based on the officer's viewing of the metal pipe; the officer was then lawfully in a position to observe in plain view a glass pipe containing methamphetamine. *Glenn v. State*, 285 Ga. App. 872, 648 S.E.2d 177 (2007).

**Consent given by outbuilding owners and property deemed abandoned.** —

With regard to a defendant's convictions for sexual abuse of a child, the trial court properly denied the defendant's motion to suppress various items found in an outbuilding that the defendant, the victim, and the victim's parent had been living in as the owners of the outbuilding consented to the entry by the police as well as had brought certain items to the police themselves. The defendant's failure to retrieve the items for over three months, despite repeated requests on the part of the owners to get the items, as well as the defendant moving out of state sufficiently established that the defendant

had abandoned the property, thus, no illegal search and seizure was possible. *Driggers v. State*, 295 Ga. App. 711, 673 S.E.2d 95 (2009).

**Officers had no knowledge of bond order when conducting search.** — Defendant's drug-related convictions were reversed on appeal as the trial court erred by taking judicial notice of a bond order against the defendant to justify the search of the defendant's person by two officers on patrol in a high crime area when the officers had no knowledge of the bond order at the time the search was conducted. The trial court should have conducted a hearing to determine the validity of the defendant's waiver of the defendant's Fourth Amendment rights and the reasonableness of imposing such a waiver as a condition of the defendant's pretrial release on the bond. *Cantrell v. State*, 295 Ga. App. 634, 673 S.E.2d 32 (2009).

**Search of vehicle after illegal detention not justified despite probable cause for initial stop.** — Trial court erred by denying two defendants' motion to suppress the drug evidence found in the vehicle in which one defendant was driving, and the other defendant was a passenger, because the search of the vehicle was conducted after the defendants were illegally detained after a traffic stop. The officers were justified in stopping the vehicle upon observing the vehicle speeding but by only observing nervousness and an expandable baton, the officers exceeded the scope of a permissible search by continuing to detain the defendants without any cause to believe the defendants were dangerous; thus, the search was not justified. *Bell v. State*, 295 Ga. App. 607, 672 S.E.2d 675 (2009).

**Search of vehicle in parking lot of closed gas station proper.** — Officers were authorized to search the defendants' vehicle for weapons to ensure the officers' safety under circumstances in which an officer investigating a burglary call found the defendants parked in the dark lot of a closed gas station, the defendants claimed that the defendants had mechanical difficulty but there were other open gas stations nearby, the defendants were unduly nervous and appeared to have been hiding the interior of the vehicle while the defen-

dants kept moving in and out of the vehicle, and the officer saw bags in the vehicle; additionally, the officer's concern increased when the men separated and one of them "got around behind" the officer's patrol car. The fact that the defendants were outside the vehicle when the search was conducted did not change the result because a suspect re-entering a suspect's car after an investigative detention would have had access to any weapon therein. *Kennedy v. State*, 298 Ga. App. 372, 680 S.E.2d 478 (2009).

**Unlawful search of vehicle in apartment complex.** — Trial court did not err in granting the defendant's motion to suppress all evidence seized after the vehicle the defendant was driving was stopped because the defendant did not abandon the car or lose any reasonable expectation of privacy with regard to the car; when the defendant ran away after the traffic stop, the police officer had just observed the defendant park the car within a parking space of an apartment complex, where the person to whom the car's registered owner had entrusted the vehicle lived, and because the evidence from which the officer ascertained the defendant's identity derived from documents found during the unlawful search of the car, the trial court did not err in rejecting the state's argument that the items retrieved from the sidewalk were admissible in a trial against the defendant. *State v. Nesbitt*, 305 Ga. App. 28, 699 S.E.2d 368 (2010).

**Search of hotel room.** — Contraband found by police officers in the defendant's hotel room was properly seized under the Fourth Amendment because the hotel manager had the authority to terminate the defendant's rental agreement without prior notice on the ground the defendant was selling drugs from the room and creating a disturbance at the hotel, and did so before the officers went to the room; thus, the defendant no longer had a reasonable expectation of privacy in the room. The officers had to determine if anyone was in the room before the clerk could lock the door and effectuate the eviction, and thus properly entered the room to search in places where someone could be hiding and properly seized marijuana found on a table in plain view, as

well as marijuana located under the bed. *Johnson v. State*, 285 Ga. 571, 679 S.E.2d 340 (2009).

Trial court erred in granting the defendants' motion to suppress evidence found in a hotel room and by assuming that the defendants had a continuing expectation of privacy in a hotel room because a guest services agent had the authority to evict the defendants from the room once the agent learned that the defendants had checked into the hotel using a fraudulent credit card, and because the defendants had obtained the room through a fraudulent credit card that would not be honored by the credit card company, the defendants were not paying a fee for the room and were not guests within the meaning of O.C.G.A. § 43-21-1(1); therefore, the defendants could be evicted from the room for cause, and if the defendants were being evicted from the hotel for cause, under O.C.G.A. § 43-21-3.1(b), the defendants were not entitled to notice of the eviction. *State v. Delvechio*, 301 Ga. App. 560, 687 S.E.2d 845 (2009).

**Search of commercial establishment.** — Night club and owner's U.S. Const., amends. IV and XIV and Ga. Const. 1983, Art. I, Sec. I, Para. XIII claims against two police officers survived summary judgment after the club and the owners alleged that the officers entered the club without a warrant, probable cause, or exigent circumstances, ordered the lights turned on and the music stopped, frisked the club's patrons and handcuffed some of the patrons without making any arrests, and acted in an intimidating manner. *Illusions of the South, Inc. v. City of Valdosta*, No. 7:07-cv-6 (HL), 2009 U.S. Dist. LEXIS 27154 (M.D. Ga. Mar. 30, 2009).

**Items in plain view seen through open door to residence.** — In a cocaine trafficking prosecution, though the defendant testified that an officer kicked in the door to the defendant's residence, as the defendant's landlord testified that there was no damage to the front door, and the trial court was entitled to believe the officer's testimony that the door was open, the officer was entitled to seize drugs seen in plain view through the open door. Therefore, the defendant's motion to sup-

press the drugs was properly denied. *Reid v. State*, 298 Ga. App. 889, 681 S.E.2d 671 (2009).

### 3. Consent Searches

**Consent to search properly imposed as probation condition.** — Trial court did not err in denying the defendant's motion to suppress, as a consent to search was properly imposed as a condition of the defendant's probation and did not amount to a waiver of rights; thus, the defendant's tacit acceptance of this special condition provided the police with the authority to search. *Peardon v. State*, 287 Ga. App. 158, 651 S.E.2d 121 (2007).

#### **Lack of authority to consent to search.**

Evidence seized from defendant's locked gun cabinet during a warrantless search of defendant's residence was properly suppressed because defendant's spouse lacked authority to consent to search of the locked cabinet since the spouse informed an officer that the cabinet belonged to defendant and that the defendant was the only one who possessed a key to the cabinet. *State v. Parrish*, 302 Ga. App. 838, 691 S.E.2d 888 (2010).

**Authority to consent to search.** — Evidence was sufficient to support the trial court's finding that the defendant's stepparent had authority to consent to a warrantless entry and search of the stepparent's home; it was undisputed that the stepparent owned the home, and the state was not required to produce a deed. *Thomas v. State*, 290 Ga. App. 10, 658 S.E.2d 796 (2008).

**Parent's consent to search of home.** — Suppression of dark clothing found in a crawl space in the home of the defendant's parent was not required because the evidence supported the finding that, when a police officer stopped and questioned the defendant's parent at a grocery store soon after the defendant was identified as a suspect in the robbery of the store, the officer's actions were perfectly reasonable given the totality of the circumstances, and there was nothing presented to rebut the evidence that the parent's consent to search the parent's home was voluntary. *Jupiter v. State*, 308 Ga. App. 386, 707 S.E.2d 592 (2011).

#### **Person who consents cannot complain of illegal search and seizure.**

Trial court properly denied a defendant's motion to suppress two videotapes seized from the defendant's residence that displayed the defendant engaging in sexual acts with two minors because the defendant had consented to the deputies playing the first videotape, thereby obviating the need for a search warrant, and a third party had spontaneously and voluntarily handed the videotape to the deputies. *Mitchell v. State*, 289 Ga. App. 55, 656 S.E.2d 145 (2007), cert. dismissed, No. S08C0770, 2008 Ga. LEXIS 499 (Ga. 2008).

#### **Scope of consent to search pockets.**

Trial court properly denied the defendant's motion to suppress the evidence seized as a result of a pat-down search, because the defendant consented to the search and, under the plain-feel doctrine, the officer conducting the search was authorized to retrieve a plastic bag suspected to be illegal contraband from the defendant's watch pocket. *Dunn v. State*, 289 Ga. App. 585, 657 S.E.2d 649 (2008), cert. denied, 2008 Ga. LEXIS 496 (Ga. 2008).

An officer exceeded the permissible scope of a consent frisk for weapons as nothing indicated that a cigar box that the officer removed from the defendant's pocket felt like a gun or other weapon, and the officer pointed to no particularized facts that reasonably led the officer to believe that the defendant might have a weapon. Thus, crack cocaine found in the box was inadmissible. *Brown v. State*, 293 Ga. App. 564, 667 S.E.2d 410 (2008).

Trial court properly denied defendant's suppression motion as drug evidence was properly seized during a pat-down search of defendant's person for weapons, which was justified under O.C.G.A. § 17-5-28 because police were in the process of executing a search warrant to search for drugs; a deputy's removal of a package from defendant's pants pocket was within the scope of defendant's consent. *Brint v. State*, 306 Ga. App. 10, 701 S.E.2d 507 (2010).

**Scope of consent did not extend to looking down defendant's pants.** — Trial court erred in denying defendant's

motion to suppress evidence a police officer found while conducting a search of defendant's person because the purportedly consensual search of defendant's person was unlawful when the consent was the product of an illegal detention; even if defendant's consent was not the product of an illegal detention, the search exceeded the scope of defendant's consent because defendant's indication that the defendant did not "have a problem" with the officer searching the defendant's pockets could not be interpreted as having extended so far as to have authorized the officer to, after searching all of defendant's pockets and finding nothing, push defendant's abdomen, pull defendant's waistband forward, and look down inside defendant's pants for narcotics. *Walker v. State*, 299 Ga. App. 788, 683 S.E.2d 867 (2009).

**Scope of consent extended to trunk.** — Defendant was not entitled to suppression of, *inter alia*, marijuana seized from the trunk of a car in which the defendant was a passenger because a police officer did not exceed the scope of the driver's consent to search, which allegedly was limited to looking in the car, by opening the trunk as the officer had discussed the problems with contraband being transported on the state highways prior to requesting the driver's consent; thus, the driver was on notice that the officer was looking for contraband. *Davis v. State*, 297 Ga. App. 319, 677 S.E.2d 372 (2009).

**Consent to search included bed of truck.** — Search of the defendant's truck did not exceed the scope of the defendant's consent as a reasonable person would have understood the defendant's consent, given after the officer asked if there was anything in the vehicle the defendant should be concerned with, to include a search of the passenger compartment of the truck and the bed of the truck. *Berry v. State*, 318 Ga. App. 806, 734 S.E.2d 768 (2012).

**Search of glove box.** — Deputy who searched the defendant's car had probable cause to believe that contraband was behind the dashboard near the glove compartment and did not exceed the scope of the defendant's consent by prying open the glove compartment; the deputy observed before the search that both the

defendant and the defendant's sibling were extremely nervous, after the search began, the deputy noticed that screws securing the glove compartment were scratched or missing, the deputy smelled marijuana while using a screwdriver to lift the glove compartment to allow the deputy to see behind the dashboard, and the defendant consented to a "complete" search of the vehicle. *Medvar v. State*, 286 Ga. App. 177, 648 S.E.2d 406 (2007).

**Probationer waives rights where probationer consents to periodic searches.**

Trial court did not err in denying the defendant's motion to suppress the results of a search of the defendant's person and home because the defendant validly waived the defendant's Fourth Amendment rights under the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. XIII, when the defendant entered into a negotiated guilty plea to possession of a firearm and possession of marijuana; the transcripts of the defendant's guilty plea revealed that the defendant was informed by the assistant district attorney that a Fourth Amendment waiver was part of the negotiation, neither the defendant nor the attorney objected to the Fourth Amendment waiver during the plea, the trial court explained the Fourth Amendment waiver to the defendant on the record, and the defendant signed a waiver as a special condition of probation. *Morrow v. State*, 311 Ga. App. 323, 715 S.E.2d 744 (2011), cert. denied, No. S11C1872, 2011 Ga. LEXIS 993 (Ga. 2011).

**Handcuffed defendant gave free and voluntary consent to search.** — Trial court did not err in denying the defendant's motion to suppress evidence police officers seized from the defendant's apartment because the state satisfied the state's burden of showing that the defendant's consent to the search was not the product of coercion, express or implied, and although the defendant was handcuffed at the time the defendant consented to the search, voluntary consent could be given while a suspect was handcuffed; the evidence supported a finding that one of the officers requested and received the defendant's consent to search

under permissible circumstances, and the officer testified that the officer's gun was not drawn and that the defendant was compliant. *Silverio v. State*, 306 Ga. App. 438, 702 S.E.2d 717 (2010).

**Sufficient evidence of free and voluntary consent.**

Because the defendant's consent to search was not obtained by deceit, the defendant voluntarily accompanied officers to the motel room searched, and the consent was not the product of an illegal detention, suppression of the contraband seized was unwarranted. *Miller v. State*, 287 Ga. App. 179, 651 S.E.2d 103 (2007).

A trial court did not err in denying either defendant's motion to suppress the methamphetamine seized during the consensual search of defendant's vehicle or a motion to suppress defendant's voluntary custodial statement, as the testimony of the arresting and investigating officers established that defendant did not display any problems with the understanding of the English language as did videotapes of the vehicle search and the in custody interview, which likewise showed defendant having no problems with the English language. Therefore, defendant's consent to the search of the vehicle nor defendant's waiver of defendant's Miranda rights were invalidated. *Serrano v. State*, 291 Ga. App. 500, 662 S.E.2d 280 (2008).

Because defendant waived defendant's Miranda rights and because defendant freely and voluntarily consented to a search of defendant's premises, to a drug test, and to an interview, defendant's consent was not the product of coercion; accordingly, the trial court properly denied defendant's motion to suppress. *Handy v. State*, 298 Ga. App. 633, 680 S.E.2d 646 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence seized during the warrantless search of the defendant's residence because the evidence supported the trial court's finding that the defendant and the defendant's roommate freely and voluntarily consented to the search of their residence, and the officers testified that the officers did not coerce, threaten, or offer any hope of benefit to obtain the consents; the roommate gave the officers consent to search

the common areas of the residence, and after the defendant arrived at the residence, the defendant likewise consented to the searches of the defendant's bedroom and of the defendant's person. *Park v. State*, 308 Ga. App. 648, 708 S.E.2d 614 (2011).

Trial court did not err in denying a motion to suppress evidence a police officer seized in a hotel room because the trial court was authorized to find that the state satisfied the state's burden of showing that the defendant's consent to enter the hotel room was voluntary and not the product of coercion, express or implied; the officer's testimony and the defendant's statement supported a finding that the officer requested and received the defendant's consent to enter the hotel room under circumstances that did not suggest either coercion or threat, and the trial court was authorized to infer that the defendant's consent to search was freely given in the calculated hope that the officer would not find the hidden contraband. *Liles v. State*, 311 Ga. App. 355, 716 S.E.2d 228 (2011).

**Consent to search.**

Trial court did not err in denying the defendant's motion to suppress evidence a police officer found in the defendant's wallet during a traffic stop of the vehicle in which the defendant was a passenger because the defendant voluntarily consented to the officer's search of the wallet; although the officer did not have a proper basis to frisk the defendant after asking the defendant to exit the automobile, the contraband was not uncovered during the unlawful pat-down, and the prior unlawful pat-down did not operate to invalidate the defendant's later consent to the search of the wallet. *Rogue v. State*, 311 Ga. App. 421, 715 S.E.2d 814 (2011).

Trial court did not err in failing to grant the defendant's motion to suppress a pistol because the search of a residence was properly conducted when the police obtained the consent of the homeowner; the defendant, who was a visitor at the residence, was physically present but failed to express any refusal of consent or any objection to a police search. *Rockholt v. State*, 291 Ga. 85, 727 S.E.2d 492 (2012).

**Search of vehicle passenger not product of illegally expanded traffic**

**stop and not expansion of consent given.** — Trial court properly denied defendant's motion to suppress the evidence of pills found on the defendant's person during a traffic stop and convicted the defendant of possession of dihydrocodeinone, since the pat down search of the defendant did not exceed the scope of the consent search and was authorized to ensure the officer's safety, and the safety of others, based on the vehicle driver identifying various weapons in the car. Further, the traffic stop was not illegally expanded since the defendant's arrest occurred nine minutes into the stop and the driver's radar check remained outstanding at the time. *Stagg v. State*, 297 Ga. App. 640, 678 S.E.2d 108 (2009).

**Consent to auto search.**

The trial court properly denied the defendant's motion to suppress the marijuana seized, as the search of the defendant's truck was conducted after a valid traffic stop after the defendant gave the officer consent to conduct the search, and nothing supported the defendant's claim that this consent was coerced because it was obtained during a custodial interrogation and without the benefit of *Miranda* warnings, as the officer's questioning did not unduly prolong the traffic stop and did not result in an unauthorized seizure or an equivalent custodial detention for which *Miranda* warnings were required. *Trujillo v. State*, 286 Ga. App. 438, 649 S.E.2d 573 (2007).

A trial court did not err in denying a defendant's motion to suppress the evidence gathered in the search of his vehicle, which resulted in the seizure of a plastic bag containing additional baggies that tested positive as to containing methamphetamine, in light of the state's evidence indicating that the defendant had been driving under the influence; while the state introduced evidence indicating that the defendant had been driving under the influence, the state's evidence also showed that the arresting officer asked for and got the defendant's consent only after the defendant convinced the officer that the defendant was in full possession of his faculties. *Davis v. State*, 287 Ga. App. 478, 651 S.E.2d 750 (2007), cert. denied, 2008 Ga. LEXIS 179 (Ga. 2008).

Because a police officer was authorized to stop defendant's vehicle based on a suspicion that defendant had illegally dumped trash, and because defendant consented to a search of the vehicle, the items seized from the vehicle would not have been suppressed; accordingly, defendant's ineffective assistance claim failed, and the trial court properly denied defendant's motion to withdraw defendant's Alford plea. *Bishop v. State*, 299 Ga. App. 241, 682 S.E.2d 201 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer found in the defendant's vehicle because the defendant's consent to search the vehicle was not the product of an illegal detention since after returning the defendant's driver's license and issuing a warning ticket, the officer told the defendant that the defendant was free to leave, but the defendant remained on the scene and engaged in casual conversation about the high level of drug activity in the area and the fact that the defendant worked nearby; the defendant's conduct showed that the defendant did not feel intimidated by the officer's presence, and under the circumstances, the initial traffic stop had de-escalated into a consensual encounter when the officer requested consent to search, which the defendant readily provided, and there was no evidence that the officer coerced the defendant's consent, tricked the defendant, or conveyed a message that the defendant's consent to search was required. *Davis v. State*, 306 Ga. App. 185, 702 S.E.2d 14 (2010).

Trial court did not err in denying the defendant's motion to suppress marijuana a police officer found during the search of the defendant's car because the evidence showed that the defendant was legally detained when the officer requested consent to search; the officer's testimony reflected that the officer sought consent to search immediately after issuing a verbal warning. *Nix v. State*, 312 Ga. App. 43, 717 S.E.2d 550 (2011).

Trial counsel was not deficient for failing to move to suppress evidence an officer obtained during a traffic stop because there was no illegal detention that would have supported a motion to suppress since

the officer's uncontradicted testimony that the officer observed the defendant's car failing to maintain the car's lane provided the reasonable suspicion necessary to support the traffic stop; immediately after checking the defendant's license and insurance, the officer asked for and obtained the defendant's consent to search the vehicle, after which the defendant fled from the scene. *Ross v. State*, 313 Ga. App. 695, 722 S.E.2d 411 (2012).

**Consent not valid where defendant was not free to go.**

A trial court erred by denying a defendant's motion to suppress the evidence seized from the defendant's vehicle, despite the defendant consenting to the search of the vehicle, as the police's detention of the defendant was unlawful in as much as no warrant existed since the seizure of the defendant arose from the defendant arriving at a location under surveillance for drug manufacturing based on an anonymous tip regarding a codefendant, and the tip had nothing to do with the defendant. By an officer, who knew the defendant, forcibly opening the defendant's vehicle door, the defendant's movement was physically restrained and the fact that the defendant consented to the search did not validate the search since the consent was the product of a wrongful detention. *Smith v. State*, 288 Ga. App. 87, 653 S.E.2d 510 (2007).

**Mere acquiescence to authority of officer did not substitute for free and voluntary consent.** — Despite the fact that the trial court concluded that the second of two defendant's warrantless arrest was unauthorized under O.C.G.A. § 17-4-20(a), because mere acquiescence to the authority asserted by a police lieutenant by both the defendants could not substitute for a free and voluntary consent to search, the trial court erred in finding that said acquiescence granted valid consent to the officer. Thus, the trial court's grant of the motions to suppress filed, in part, was reversed. *Hollenback v. State*, 289 Ga. App. 516, 657 S.E.2d 884 (2008).

**Consent coerced.** — Trial court erred by denying defendants' motion to suppress drug and weapon evidence found in defendants' vehicle during a search after a

routine traffic stop as the driver's consent to search was coerced in violation of defendants' Fourth Amendment rights by an officer's intimidating, harassing, and threatening words of arrest used to convince the driver to consent. A videotape of the stop showed that the officer threatened the driver with obstruction of justice and that the officer would bring a dog to the scene if the driver did not consent to the search. *Cuaresma v. State*, 292 Ga. App. 43, 663 S.E.2d 396 (2008).

**Withdrawal of consent not shown.**

— An investigator's testimony that the defendant "got kind of upset a little bit" upon being questioned regarding the things which had been found at the defendant's trailer did not demonstrate that the defendant withdrew consent to a search. *Boone v. State*, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

#### 4. Inventory Searches

**Inventory search authorized, etc.**

Because an officer was authorized to arrest the defendant for weaving, a decision to impound the vehicle the defendant was driving was not unreasonable, and an inventory search of the vehicle was authorized; thus, the trial court did not err in denying the defendant's motion to suppress the evidence seized as a result of the search. *Lopez v. State*, 286 Ga. App. 873, 650 S.E.2d 430 (2007).

Trial court did not err in denying the defendant's motion to suppress because there was evidence to support the trial court's finding that the officers' search of a zippered, red bag found during the inventory search of the defendant's motorcycle was conducted pursuant to State Patrol procedures, which required that all items of value be listed and, thus, did not exceed the permissible scope of the inventory search; there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation. *Grizzle v. State*, 310 Ga. App. 577, 713 S.E.2d 701 (2011).

Trial court did not err in denying the defendant's motion to suppress because the trial court's finding that the impoundment of the defendant's motorcycle was reasonably necessary under the circum-

stances was supported by the evidence because the defendant was arrested for attempting to elude police and for several traffic offenses, including driving with an expired license, and the defendant was not going to be allowed to drive the motorcycle under any circumstances. *Grizzle v. State*, 310 Ga. App. 577, 713 S.E.2d 701 (2011).

**Inventory search of vehicle pursuant to impoundment.** — Trial court erred in denying the defendant's motion to suppress because the inventory search of a van was unreasonable under the Fourth Amendment due to a lack of evidence of police policy; the record contained no evidence about the police department's policy or procedures on inventory searches, but rather, the officers simply testified that the officers' searches of a flatbed wrecker, the van, and the van's contents were inventory searches pursuant to the impoundment. *Capellan v. State*, 316 Ga. App. 467, 729 S.E.2d 602 (2012).

## Search Warrants

### 1. In General

**Effect of incorrect date in warrant.** — Because affidavit accompanying a search warrant contained sufficient probable cause and resulting search was not rendered illegal merely because the date on the warrant post-dated the search by one day, trial court did not err in denying defendant's motion to suppress evidence seized pursuant to the warrant. *Jones v. State*, 289 Ga. App. 767, 658 S.E.2d 386 (2008).

**Failure to include affidavit or warrant in record on appeal.** — Although a defendant challenged the validity of an affidavit supporting a search warrant, neither the warrant nor the affidavit was in the record; thus, the court had to assume that the trial court's decision as to the exclusion of the search results was correct. *Williams v. State*, 287 Ga. App. 361, 651 S.E.2d 768 (2007).

**Incorrect street address invalidated warrant.** — A search warrant containing the wrong street address was defective under both the federal and Georgia constitutions as the defect was not a mere technical irregularity under O.C.G.A.

§ 17-5-31 because it did not incorporate the affidavit and application and thus could not be construed with reference to them; furthermore, the warrant did not contain other descriptive elements that would allow an officer to locate the place with reasonable certainty. *Thomas v. State*, 287 Ga. App. 262, 651 S.E.2d 183 (2007).

### Sufficient particularity.

The trial court properly denied suppression of the defendant's blood sample for a DNA comparison pursuant to particularized search warrant seeking the sample, as the warrant and the attached affidavit when read together particularly described the evidence to be seized and gave the executing officers adequate notice of the search warrant's scope and command. *Holloway v. State*, 287 Ga. App. 655, 653 S.E.2d 95 (2007).

Trial court did not err in denying the defendant's motion to suppress evidence police officers found at a residence because the fact that the investigator who submitted the affidavit for the search warrant did not leave a copy of the affidavit with the warrant at the premises did not render the warrant invalid; the warrant satisfied the particularity requirement of the Fourth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIII on the warrant's face because the warrant listed the address of the place to be searched and contained a description of the home, and the warrant also listed items to be seized, including marijuana, weighing devices, and other paraphernalia used in the distribution of drugs. *Pass v. State*, 309 Ga. App. 440, 710 S.E.2d 641 (2011).

**Not invalid when signed by de facto magistrate.** — In a defendant's prosecution on charges of possession of marijuana with intent to distribute and possession of cocaine with intent to distribute, a search warrant issued by an assistant magistrate at the magistrate's direction was invalid because the assistant magistrate could not be considered a de facto officer as no such office had been created by the county commissioners or by the superior court judges under O.C.G.A. § 15-10-20(a). *Beck v. State*, 283 Ga. 352, 658 S.E.2d 577 (2008).

### "Staleness" of warrant.

An informant's tip was not stale be-

cause the officer waited 72 hours after receiving the tip to seek a search warrant. Regardless of whether the methamphetamine seen by the informant was still in the house, the information provided a substantial basis for believing that when the magistrate issued the warrant, methamphetamine was being manufactured there. *Zorn v. State*, 291 Ga. App. 613, 662 S.E.2d 370 (2008).

**Sufficient facts to issue warrant for defendant's medical records.** —

Search warrant for the defendant's medical records was proper because the affidavit listed the crimes that were believed to have been committed, including DUI, and averred that the defendant caused an accident and had open and empty beer cans inside the defendant's vehicle; the affidavit included sufficient facts to support a finding that evidence of the crime was in the medical records, and the evidence supported the magistrate's finding of probable cause. Therefore, the defendant's argument that the warrant was invalid because the warrant omitted relevant information and contained false and misleading information was rejected. *Brogdon v. State*, 299 Ga. App. 547, 683 S.E.2d 99 (2009), *aff'd*, 287 Ga. 528, 697 S.E.2d 211 (2010).

Search warrant authorizing a search of defendant's hospital records relating to the defendant's treatment on the night of a shooting was constitutional under U.S. Const., amend. IV and Ga. Const. 1983, Art. I, Sec. I, Para. XIII because the defendant could not claim an expectation of privacy in the medical records to the extent that the records contained information the defendant disclosed to medical personnel or medical personnel disclosed to the defendant in the presence of two police officers. *Bowling v. State*, 289 Ga. 881, 717 S.E.2d 190 (2011).

**2. Informants' Reliability and Affidavits**

**Suppression motion properly denied.**

Trial court properly denied a motion to suppress evidence found pursuant to a search warrant. An informant's predictions that a third person would go to a house near a certain highway and buy

drugs from a person with the defendant's first name was confirmed by police; incorrect statements in an officer's affidavit that a vehicle did not stop on the way to and from the defendant's house did not change the determination that probable cause existed to issue the warrant; and the failure of the officer to state that the informant had pending criminal charges did not require a different result. *Spaeth v. State*, 293 Ga. App. 608, 667 S.E.2d 449 (2008).

Trial court did not err in denying the defendant's motion to suppress evidence seized in a hotel suite because the affidavit supporting the search warrant for a hotel suite recited probable cause to believe that drugs would be found on the premises under the defendant's possession, custody, and control, namely the two-room suite that the hotel designated and rented to the defendant. *Glass v. State*, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

**Informant observed in controlled buy of drugs.**

Trial court did not err in denying the defendant's motion to suppress evidence police officers found at a residence because, under the totality of the circumstances, the magistrate had a substantial basis for concluding that there was a fair probability contraband would be found at the residence; the affidavit for the search warrant revealed that an informant participated in a drug buy using law enforcement funds, and an officer transported the informant to the premises, where the informant made the purchase, and the informant provided the purchased contraband to the officer. *Pass v. State*, 309 Ga. App. 440, 710 S.E.2d 641 (2011).

**Information in affidavit sufficient.**

— An affidavit in support of a search warrant was not insufficient because an officer had not told the magistrate about an informant's criminal history and that the informant would be paid \$20 if the tip led to an arrest. Nothing indicated that the affidavit contained deliberate falsehoods, that the officer made it with reckless disregard for the truth, or that the officer consciously omitted material information which, if it had been included in the affidavit, would have been indicative

of the absence of probable cause; furthermore, the informant's previous work with police, which was set forth in the affidavit, provided a substantial basis for deeming the informant reliable. *Zorn v. State*, 291 Ga. App. 613, 662 S.E.2d 370 (2008).

Affidavit filed in support of a search warrant of the defendant's home established probable cause because, *inter alia*, information received from one confidential informant (CI) was corroborated, and an admission against penal interest made by a second CI supported a finding of reliability; further, the affidavit established that a third informant was truly a concerned citizen, and the information provided by the concerned citizen corroborated the information provided by the CIs. Considering the totality of the circumstances and the facts that the concerned citizen had training in recognition and effects of various illegal drugs and had seen, within 72 hours at the premises to be searched, a powder substance said to be drugs that belonged to the defendant, the state established probable cause for the warrant. *Price v. State*, 297 Ga. App. 501, 677 S.E.2d 683 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence a detective found in the defendant's home because given the totality of the circumstances, the magistrate who issued the search warrant was authorized to conclude that there was a fair probability that contraband would be found at defendant's home; the detective's affidavit in support of the warrant contained ample facts by which the magistrate could independently evaluate the veracity and reliability of anonymous informants and their information, and a confidential informant's controlled buy of marijuana from the defendant at the defendant's residence on the day the detective applied for the warrant independently confirmed that illegal drug activities were taking place at the home. *Taylor v. State*, 306 Ga. App. 175, 702 S.E.2d 28 (2010).

Even assuming that material evidence was omitted from the affidavit supporting the search warrant, the magistrate nevertheless had probable cause for issuance of the search warrant because the affidavit stated that the defendant had possibly

fathered the victim's child, the defendant had a sexual relationship with the victim from the time the victim was 10 years old until the victim was 15 years old, the victim's son was conceived during that time period, and the son's father had not been scientifically identified. *Rhodes v. State*, 319 Ga. App. 684, 738 S.E.2d 135 (2013).

### 3. Probable Cause

#### Probable cause set forth in affidavit.

Trial court properly denied defendant's motion to suppress evidence found during the execution of a search warrant as the appellate court found that, after reviewing all of the information in the affidavit as a whole, it provided sufficient probable cause for the magistrate to issue the search warrant and that the information provided was not stale. The warrant was executed the same day that it was issued and was supported by a law enforcement affidavit reciting a stop made of defendant's vehicle for a failure to have tags and various drugs and drug-related items found in the vehicle that served as the basis for obtaining the search warrant for defendant's home. *Cleveland v. State*, 290 Ga. App. 835, 660 S.E.2d 777 (2008).

Because the information in an affidavit provided the magistrate a substantial basis for concluding that probable cause existed for issuing the search warrant, a motion to suppress the search warrant would have been futile; accordingly, defendant failed to show that counsel was ineffective. *Jarrett v. State*, 299 Ga. App. 525, 683 S.E.2d 116 (2009).

Trial court properly found that under the totality of the circumstances the affidavit in support of a search warrant for a residence suspected of being a marijuana "grow house" gave the magistrate a substantial basis for concluding that probable cause existed because the affidavit set forth the fact that similar investigations and seizures had taken place in several grow houses in the area, the house under surveillance had characteristics similar to those houses, and two men fled from the residence and were apprehended with large amounts of cash; the information from the stop was not excludable as

“stale” because there was a substantial basis for believing that the electrical ballasts and light fixtures identified in the search warrant could still be found at the residence and the items were not perishable. *Prado v. State*, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Trial court did not err in denying the defendant’s motion under O.C.G.A. § 17-5-30 to suppress evidence seized pursuant to search warrants because the applications for search warrants to search the defendant’s apartment and the car for which registration information was given in the detective’s affidavit contained sufficient information from which a judicial officer could determine there was a fair probability that evidence of a crime would be found at those sites as the sites were likely methods of transporting the victim and the likely destination of appellant and the victim; in the detective’s affidavit, the detective related the discovery of the victim’s body and the statements of the victim’s friend and roommate concerning the victim’s relationship with the defendant, and the victim’s pregnancy and identification of the defendant as the father, who was not pleased about the pregnancy. *Glenn v. State*, 288 Ga. 462, 704 S.E.2d 794 (2010).

Trial court did not err in denying the defendant’s motion to suppress evidence seized from a search warrant authorizing entry into the defendant’s home because the affidavit submitted in support of the warrant provided a sufficient basis for the magistrate to make a practical, common-sense decision that there was a fair probability that evidence of sexual exploitation of children would be found at the defendant’s residence; the National Center for Missing and Exploited Children forwarded the information it received from a security specialist employed by the host of the website to the Georgia Bureau of Investigation (GBI), and the affidavit of a special agent with the GBI set forth facts that showed both the reliability and basis of knowledge of the specialist. *James v. State*, 312 Ga. App. 130, 717 S.E.2d 713 (2011), cert. denied, No. S12C0347, 2012 Ga. LEXIS 227 (Ga. 2012).

**Sufficient probable cause found.**

A magistrate had probable cause to is-

sue a search warrant for a defendant’s car the day after the victim was kidnapped and murdered; there was a fair probability that evidence of the crimes would be found in the car, which the defendant had parked in the victim’s driveway. *Dalton v. State*, 282 Ga. 300, 647 S.E.2d 580 (2007).

A trial court did not err by limiting the admissibility of admissible items in a defendant’s felony murder trial to those items seized incident to the defendant’s arrest in the early morning hours and in plain view during the processing of the crime scene as an approximately 15-minute video recording of the premises, which was viewed by the trial court, supported the officers’ testimony that guns, shell casings, significant amounts of cash, and items appearing to be crack cocaine were all in plain view and, under the circumstances, presented probable cause as being contraband or evidence of the crime of the felony murder of an officer. *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008).

Because the application for a search warrant established that the victim lived in a residence at a specific address, that defendant lived in the basement apartment located in the residence, that defendant had severely beaten the victim, and that there was a fair probability that evidence of the crime could be found either in defendant’s apartment or in the victim’s part of the residence, probable cause existed to search defendant’s basement apartment and the victim’s part of the residence; accordingly, the trial court properly denied defendant’s motion to suppress the evidence found in the apartment. *Fletcher v. State*, 284 Ga. 653, 670 S.E.2d 411 (2008).

Search warrant was properly issued based on information from a caller to social services that methamphetamine was being made in the defendant’s home in the presence of a six-year-old and on information from an officer that the defendant had been investigated for the drug, that the defendant had a reputation of dealing, using, and making methamphetamine, and that numerous tips about the defendant’s manufacturing methamphetamine had been received. Moreover, the information was not stale as the informa-

tion received from multiple sources indicated a long-term involvement in the manufacture of the drug and therefore a likelihood that the equipment for the drug's production would remain in place over time. *Chambliss v. State*, 298 Ga. App. 293, 679 S.E.2d 831 (2009).

**Insufficient probable cause found.**

— Because: (1) the state conceded that its informant was not reliable, as the informant never previously provided information to its investigator; and (2) the police failed to independently investigate and corroborate the information provided to them by that informant in support of a search warrant affidavit, the magistrate lacked a substantial basis for determining that probable cause existed to search the defendant's home; thus, the evidence seized as a result should have been suppressed. *St. Fleur v. State*, 286 Ga. App. 564, 649 S.E.2d 817 (2007).

Trial court did not err in denying the defendant's motion to suppress the DNA evidence obtained pursuant to a search warrant, as the warrant, given the totality of the circumstances, was based upon sufficient fingerprint evidence which provided an accurate foundation for identifying the defendant as a suspect in all four crimes. *Carruth v. State*, 286 Ga. App. 431, 649 S.E.2d 557 (2007).

Because the evidence gathered while the defendant's residence was under surveillance, including the contents of the defendant's garbage as well as an officer's specific testimony regarding marijuana residue found on a piece of plastic wrap, supported a finding of probable cause necessary to justify the issuance of a search warrant for the defendant's residence, suppression of the evidence seized as a result of the execution of the search warrant was improper. *State v. Davis*, 288 Ga. App. 164, 653 S.E.2d 311 (2007).

#### 4. Exceptions to Warrant Requirement

**Search incident to arrest.** — Search of a vehicle was authorized as a search incident to a lawful arrest as it was reasonable for the officers to believe that the vehicle possibly contained evidence of the crime under investigation, in that the officers saw the defendant and another

individual, for whom the officers had an arrest warrant, driving in a vehicle similar to the one seen leaving a crime scene, and the officers saw clothing on the back-seat matching the description of the clothing worn by the two gunmen at the time of the crime. *Williams v. State*, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

**Pat-down permitted.**

Statement by a defendant who had been stopped for speeding that the defendant had a knife, and the defendant's overly-nervous demeanor, authorized a trooper to pat the defendant down for the trooper's safety. A "plain feel" of an apparent methamphetamine pipe in the defendant's pocket authorized the trooper to remove the pipe; therefore, the pipe and methamphetamine found pursuant to a search of the defendant's pockets were admissible. *Hicks v. State*, 293 Ga. App. 745, 667 S.E.2d 715 (2008).

**"Plain view" doctrine permits warrantless search and seizure.**

Because the police were authorized to seize marijuana found in plain view, seen through the window of an apartment where they were executing an arrest warrant on another individual, once the defendant answered a knock on the apartment door, police also had the right to search incident to the defendant's arrest for possession of marijuana and based on the exigency of the circumstances; hence, the trial court erred in granting a motion to suppress the marijuana without explaining its interpretation of the evidence or ruling on the credibility of the witnesses. *State v. Venzen*, 286 Ga. App. 597, 649 S.E.2d 851 (2007).

When a deputy serving an arrest warrant on a probationer had reason to believe from the warrant that the probationer resided at the address given, the officer had the limited authority to enter the home to search for the probationer after the defendant, who answered the door, said that the probationer had moved. Once inside, the officer had the authority to seize marijuana that was in plain view. *Wall v. State*, 291 Ga. App. 278, 661 S.E.2d 656 (2008).

As a reliable confidential informant (CI) told police that the defendant would be driving one of three vehicles to a subdivi-

sion to deliver cocaine, and an officer saw the defendant and a car, both of which matched CI's description, in that subdivision, the officer had reasonable suspicion to stop the car. After a drug dog alerted to the car's passenger door, and the officer saw a digital scale of the type used to weigh drugs in plain view on the car's seat, the officer had probable cause to search the car; thus, cocaine found during the search was admissible. *Alford v. State*, 293 Ga. App. 512, 667 S.E.2d 680 (2008).

**Plain view of drugs inside car.** — Trial court did not err by denying the defendant's motion to suppress evidence an officer seized from the defendant's vehicle because the suspected contraband was in plain view from outside the vehicle, and once the officer smelled the odor of marijuana on the recovered item, the officer had even stronger grounds to search the vehicle; because the officer saw the item before returning the defendant's license or issuing the ticket, the officer was not exceeding the scope of the initial traffic stop by seizing the object. *Arnold v. State*, 315 Ga. App. 798, 728 S.E.2d 317 (2012).

**Smell of marijuana.** — A trial court properly denied a defendant's motion to suppress the evidence of drugs and a handgun found during the warrantless search of the defendant's vehicle as the arrest of the defendant's passenger on an outstanding warrant authorized the stop of the defendant's vehicle and the mobility of the car, coupled with the existence of probable cause to believe the car contained marijuana, based on the officer smelling the marijuana upon approaching the vehicle, authorized the search. *Somesso v. State*, 288 Ga. App. 291, 653 S.E.2d 855 (2007), cert. denied, 2008 Ga. LEXIS 281 (Ga. 2008).

**No amount of probable cause can justify warrantless search or seizure absent exigent circumstances.**

Because no exigency existed to justify a search after the defendant was handcuffed and placed under the watchful eye of a police officer, and even assuming that the defendant was under arrest while being detained in the kitchen, a search of the defendant's bedroom which yielded a shotgun, found under the bed in the bedroom;

a box of unspent shotgun shells, and some loose unspent shotgun shells, was not one incident to said arrest; thus, the defendant's possession of a firearm while a convicted felon conviction was reversed, and the case was remanded for a new trial in which the illegally-obtained evidence could not be introduced. *Hicks v. State*, 287 Ga. App. 105, 650 S.E.2d 767 (2007).

**Stop of vehicle justified by officer's observations.** — A trial court properly denied defendant's motion to suppress drug evidence because the stop of defendant's vehicle was justified based on the police having observed defendant at a residence under surveillance for suspected drug activity: (1) defendant went in and out of the residence under surveillance in under five minutes; (2) defendant had a drug seller as a passenger in defendant's vehicle; and (3) defendant drove to the passenger's residence. The stop was a second-tier encounter that required reasonable suspicion, and the collective knowledge of the officers involved, based on the officers' observations, justified defendant's stop. *Satterfield v. State*, 289 Ga. App. 886, 658 S.E.2d 379 (2008).

Trial court did not err by denying a motion to suppress because the evidence supported the trial court's conclusion that a police officer, who responded to a report of a fight in a parking lot, had an articulable suspicion to stop the defendant when the officer saw the defendant driving fast from the parking lot, and investigate further the defendant's connection to the reported fight. *Hines v. State*, 308 Ga. App. 299, 707 S.E.2d 534 (2011).

**Search of vehicle justified by officer's observations.**

Trial court properly denied suppression of drug evidence obtained from a search of the defendant's person after a police officer conducted an investigatory stop of the defendant's vehicle and noted a strong odor of marijuana as the officer stopped the vehicle based on a reasonable suspicion that the defendant was violating O.C.G.A. § 40-6-14(a) by the loud music emanating from the defendant's vehicle while parked in a convenience store parking lot pursuant to O.C.G.A. § 40-6-3(a)(2). *Jackson v. State*, 297 Ga. App. 615, 677 S.E.2d 782

(2009), cert. denied, No. S09C1461, 2009 Ga. LEXIS 409 (Ga. 2009).

Defendant failed to establish that trial counsel's failure to timely file a motion to suppress evidence a police officer seized from the defendant's vehicle prejudiced the case because the warrantless search of the vehicle was lawful under the automobile exception to the warrant requirement; the objective facts known to the officer after the car was lawfully stopped gave the officer probable cause to believe that the car contained contraband, and those facts included the smell of marijuana in the car, flakes of what the officer suspected to be marijuana on the floorboards of the car, and the defendant's visible agitation during the traffic stop. *Brown v. State*, 311 Ga. App. 405, 715 S.E.2d 802 (2011).

**Serving of arrest warrant and looking into open door of shed.** — Defendant's drug convictions were appropriate because the brother lived with the defendant and would be present in the home when the officers returned to serve the arrest warrant. Thus, the trial court did not err when the court concluded that the police were authorized to enter the backyard of the premises and look into the open door of the shed. *Carter v. State*, 308 Ga. App. 686, 708 S.E.2d 595 (2011), cert. denied, No. S11C1141, 2011 Ga. LEXIS 573 (Ga. 2011).

**Exigent circumstances found.** — Given the existence of exigent circumstances, law enforcement officers were justified in searching the defendant's home without a warrant in order to determine if a child was present and in need of medical attention or in danger of imminent harm; as a result, the trial court properly denied the defendant's motion to suppress evidence seized as a result of that search. *Richards v. State*, 286 Ga. App. 580, 649 S.E.2d 747 (2007), cert. denied, 2007 Ga. LEXIS 702 (Ga. 2007).

A warrantless entry of the house owned by the defendant's stepparent was justified by exigent circumstances, given that a violent felony, from which the suspect fled on an orange bicycle, had occurred nearby just minutes before and that a person matching the suspect's description and riding an orange bicycle had just entered

the stepparent's house. *Thomas v. State*, 290 Ga. App. 10, 658 S.E.2d 796 (2008).

**Reasonable suspicion not established.** — Trial court erred in denying defendant's motion to suppress as the officer simply did not have reasonable suspicion that the defendant was engaged in or about to be engaged in a violation of the law. When the officer found the defendant sleeping in a car in the parking lot of a funeral home, with the permission of the funeral home's owner, the officer did not see or smell any illegal substances; the officer did not question the defendant regarding the defendant's appearance or demeanor; the officer did not determine if the defendant had consumed alcohol; and the officer did not perform any field tests to determine if the defendant was under the influence of anything. *Martin v. State*, 316 Ga. App. 220, 729 S.E.2d 437 (2012).

## Evidence

**Evidence of DUI investigation admissible.**

Because a defendant was arrested for driving under the influence under O.C.G.A. § 40-6-391 based on probable cause and the state had complied with the implied consent requirements of O.C.G.A. § 40-5-55, the defendant could not complain that drug and alcohol testing violated the search and seizure provisions of the Fourth Amendment or the Georgia Constitution because the implied consent statute allowed for the warrantless compelled testing of bodily fluids based on the existence of probable cause, but without proof of the existence of exigent circumstances. *Cornwell v. State*, 283 Ga. 247, 657 S.E.2d 195 (2008).

**Suppression of evidence where impermissible intrusion on rights.**

A trial court properly granted a defendant's motion to suppress a firearm — a hunting rifle that was in the cab of the defendant's pick-up truck — that was seized from the vehicle after a traffic stop, because no evidence was presented of any danger to justify the warrantless search of the vehicle for weapons, and the officer acknowledged the search was conducted merely to see if the firearm was stolen, with no basis shown that criminal activity

existed. *State v. Jones*, 289 Ga. App. 176, 657 S.E.2d 253 (2008).

**Suppression motion properly denied, etc.**

Because: (1) it was reasonable for the arresting officers to act upon an investigating deputy's observations; (2) law enforcement had reasonably trustworthy information to warrant their belief that the defendant had committed or had participated in committing a burglary; and (3) a determination of probable cause to arrest the defendant could rest on the collective knowledge of the police, given the communication between them, probable cause supported the defendant's warrantless arrest and supported the admission of the seized evidence. *Murphy v. State*, 286 Ga. App. 447, 649 S.E.2d 565 (2007).

**"Plain feel" exception.**

Trial court erred in granting the defendant's motion to suppress rings a police officer seized from the defendant's pocket during a pat-down search because the seizure was authorized under the plain feel doctrine; the officer's knowledge that a man matching the defendant's description was suspected of stealing numerous rings shortly beforehand and nearby gave the officer probable cause to believe that the items the officer felt in the defendant's pocket were the stolen rings, and had the rings been in the officer's plain view when the officer detained the defendant, the officer could have seized the rings under the plain view doctrine. *State v. Cosby*, 302 Ga. App. 204, 690 S.E.2d 519 (2010).

**Seizure of contraband during justified safety frisk was proper.** — A trial court properly denied the defendant's motion to suppress the contraband found on the defendant's person as a result of a traffic stop that came to fruition after an officer observed the defendant making a U-turn in front of a recently robbed bank because the defendant admitted to having a knife in the defendant's pocket but refused to remove the defendant's hand therefrom. As a result, the police were justified in frisking the defendant for safety reasons and the contraband was, therefore, legally obtained from the defendant. *Johnson v. State*, 289 Ga. App. 27, 656 S.E.2d 161 (2007).

**Blood and urine test results, obtained without sufficient voluntary**

**consent, properly suppressed.** — Because the evidence sufficiently showed that the defendant's mental condition was clearly vulnerable, and that the defendant: (1) could not read; (2) had to be forcibly restrained while the consent form was initially being read; (3) was weeping while the remainder of the form was read; and (4) never actually signed the consent form, the trial court properly found that any consent to submit to blood and urine tests was not freely and voluntarily given. Moreover, the proper standard of review on appeal, based on the fact that credibility was an issue, was not a *de novo* standard, but a clearly erroneous standard. *State v. Stephens*, 289 Ga. App. 167, 657 S.E.2d 18 (2008).

**Statement by defendant during police investigation held admissible.** — Based on an officer's unequivocal testimony that the defendant was not under arrest when a challenged statement was made, but the officer was merely investigating the victim's stolen vehicle claim, and hence *Miranda* warnings were not required, suppression of the statement was not required. *Marshall v. State*, 286 Ga. App. 86, 648 S.E.2d 674 (2007).

With regard to defendant's felony murder conviction, the trial court properly determined that defendant was not in custody when defendant told a police officer that defendant was the shooter as, although defendant was transported to the police station in a car which had a security screen between the front and back passenger seats, and a pat-down search for officer safety was performed before defendant entered the car, those actions did not mandate a finding that defendant was in custody. At no time was defendant handcuffed, defendant's relatives were present during the interview, and the door to the detectives' work area in the police station was not locked in any way that impeded exit. *Sewell v. State*, 283 Ga. 558, 662 S.E.2d 537 (2008).

**Evidence taken after arrest based on probable cause.** — Because the record showed that every police officer on duty the day of the defendant's arrest had actual knowledge of facts sufficient to support a finding of probable cause for the arrest, the seizure of the defendant's

bloody clothes after the arrest was proper. *Simpson v. State*, 289 Ga. 685, 715 S.E.2d 142 (2011).

## RESEARCH REFERENCES

**ALR.** — Employee’s expectation of privacy in workplace, 18 ALR6th 1.

Expectation of privacy in text transmissions to or from pager, cellular telephone, or other wireless personal communications device, 25 ALR6th 201.

Timeliness of execution of search warrant, 27 ALR6th 491.

Search and seizure: reasonable expectation of privacy in outbuildings, 67 ALR6th 531.

Search and seizure: reasonable expectation of privacy in side yards, 69 ALR6th 275.

Adequacy of defense counsel’s representation of criminal client regarding search and seizure issues — Pretrial motions — Suppression motions where no warrant involved, 71 ALR6th 1.

Adequacy of defense counsel’s representation of criminal client regarding search and seizure issues — Pretrial motions — Suppression motions where warrant was involved, 72 ALR6th 1.

Reverse-Franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — Underlying homicide and assault offenses, 72 ALR6th 437.

Adequacy of defense counsel’s representation of criminal client regarding search

and seizure issues — Pretrial motions — Motions other than for suppression, 73 ALR6th 1.

Reverse-Franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for truth — Underlying drug offenses, 73 ALR6th 49.

Reverse-Franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — Underlying sexual offenses, 74 ALR6th 69.

When are facts offered in support of search warrant for evidence of federal drug offense so untimely as to be stale, 13 ALR Fed. 2d 1.

Allowable use of federal pen register and trap and trace device to trace cell phones and internet use, 15 ALR Fed. 2d 537.

Validity and application of anticipatory search warrant — federal cases, 31 ALR Fed. 2d 123.

Unconstitutional search or seizure as warranting suppression of evidence in removal proceeding, 40 ALR Fed. 2d 489.

Border search or seizure of traveler’s laptop computer, or other personal electronic or digital storage device, 45 ALR Fed. 2d 1.

## **Paragraph XIV. Benefit of counsel; accusation; list of witnesses; compulsory process.**

**Law reviews.** — For survey article on death penalty law, see 60 *Mercer L. Rev.* 105 (2008). For annual survey on criminal law, see 64 *Mercer L. Rev.* 83 (2012).

For note, “The Monster in the Closet: Declawing the Inequitable Conduct Beast in the Attorney-Client Privilege Arena,” see 25 *Ga. St. U. L. Rev.* 735 (2009). For note, “Ineffective Assistance of Counsel

Blues: Navigating the Muddy Waters of Georgia Law After 2010 State Supreme Court Decisions,” see 45 *Ga. L. Rev.* 1199 (2011). For note, “Padilla v. Kentucky: The Criminal Defense Attorney’s Obligation to Warn of Immigration Consequences of Criminal Conviction,” see 29 *Ga. St. U.L. Rev.* 891 (2012).

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

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1. IN GENERAL
2. PROCUREMENT OF COUNSEL
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3. TIME TO PREPARE
4. RIGHT TO BENEFIT OF COUNSEL
5. EFFECTIVE ASSISTANCE OF COUNSEL
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## RIGHT TO CONFRONTATION

1. IN GENERAL
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## General Consideration

**Failure to object to appointment of magistrate.** — Defendant failed to meet the burden of establishing that defendant was rendered ineffective assistance of counsel for trial counsel's failure to object to the alleged improper appointment of a chief magistrate who presided over the trial, sitting by designation following a request for judicial assistance by the superior court judge assigned to the case, since defendant failed to show that defendant was denied a fair trial by virtue of the appointment. Further, trial counsel testified at defendant's hearing on a motion for a new trial that trial counsel thought it would benefit defendant to have the particular magistrate preside over the trial rather than a superior court judge, which established that the failure to object to the appointment was a matter of trial strategy or tactics, which was not a basis for an ineffective assistance of counsel claim. *Mazza v. State*, 292 Ga. App. 168, 664 S.E.2d 548 (2008).

**Failure to object to jury.**

Claim that trial counsel rendered constitutionally ineffective assistance failed as the defendant could not show that any competent attorney would have decided not to object further to the composition of

the jury pool. *Leslie v. State*, 292 Ga. 368, 738 S.E.2d 42 (2013).

**Preservation of evidence by police.**

— State of Georgia did not act in bad faith and commit a due process violation by failing to preserve material evidence when, following a single-car accident involving the defendant's car, the state removed samples of biological evidence from the interior of the defendant's car and sold the defendant's car to a salvage wholesaler who then sold the car to a mechanic, who cleaned, repaired, repainted, and resold the vehicle. The police followed the standard policy of releasing evidence in vehicular homicide cases that the police considered to be solved. *State v. Mussman*, 289 Ga. 586, 713 S.E.2d 822 (2011).

**Denial of out of time appeal.**

Because the record showed that defendant entered into a plea freely and voluntarily, and because the evidence was sufficient to support the conviction, defendant's counsel could not have been ineffective in failing to pursue an appeal, and the trial court did not err in denying defendant's out-of-time appeal. *McCoon v. State*, 294 Ga. App. 490, 669 S.E.2d 466 (2008).

**Communications between parishioner and clergy admissible without assistance of counsel.** — Because the de-

defendant requested the future assistance of an attorney, not immediate assistance, and because the defendant knew that the defendant's confession would be handed over to law enforcement, the clergy-parishioner privilege in former O.C.G.A. §§ 24-3-51 and 24-9-22 (see now O.C.G.A. §§ 24-5-502 and 24-8-825) was inapplicable; therefore, the defendant's confession to the crimes was voluntary. *Willis v. State*, 287 Ga. 703, 699 S.E.2d 1 (2010).

**Cited in** *Davenport v. State*, 289 Ga. 399, 711 S.E.2d 699 (2011); *Bunn v. State*, 291 Ga. 183, 728 S.E.2d 569 (2012).

## Benefit of Counsel

### 1. In General

**Inadequate invocation of right to counsel.** — Because defendant's statement that defendant should not talk in the absence of "real talk" was insufficient to trigger the interrogating agent's duty to cease questioning, the trial court did not err in admitting defendant's later statements to the police. *Barnes v. State*, 287 Ga. 423, 696 S.E.2d 629 (2010).

**Defendant is not entitled to have counsel and also to self representation.**

Trial court did not abuse the court's discretion in denying the defendant's pro se request for a continuance because the defendant was represented by counsel when the defendant filed the pro se motion, thus, that motion was of no legal effect whatsoever; a criminal defendant does not have the right to self-representation and also be represented by an attorney. *Earley v. State*, 310 Ga. App. 110, 712 S.E.2d 565 (2011).

### Claim procedurally barred.

Defendant's ineffective assistance of counsel claim was procedurally barred because the defendant's appellate counsel appeared in time to file a motion for new trial and an amended motion for new trial but failed to raise the issue of ineffective assistance of trial counsel. *Machado v. State*, 300 Ga. App. 459, 685 S.E.2d 428 (2009).

Because the defendant waived the defendant's ineffective assistance claim, the court of appeals did not address the claim; although the defendant raised an ineffec-

tive assistance of counsel claim in the defendant's new trial motion, the defendant did not allege that counsel was ineffective for failure to object to the admission of the pretrial identification evidence, but on appeal, that ground represented the sole basis for the defendant's ineffective assistance claim. *Bell v. State*, 306 Ga. App. 853, 703 S.E.2d 680 (2010).

Because the defendant's claims of ineffective assistance were not raised on a motion for new trial, the claims could not be raised for the first time on appeal. *Martinez v. State*, 289 Ga. 160, 709 S.E.2d 797 (2011).

Defendant's claim that the defendant was deprived effective assistance of counsel when counsel misadvised the defendant regarding how soon the defendant would be eligible for parole was procedurally barred because the defendant failed to raise the issue before the trial court. *Davis v. State*, No. A12A0674, 2012 Ga. App. LEXIS 583 (June 27, 2012).

## 2. Procurement of Counsel

### A. Appointment of Counsel

**Failure to appoint counsel for indigent is violation of constitutional right.**

Court of appeals erred in deferring to public defender's own policy not to appoint new counsel for purposes of appeal and denying indigent defendant's request to raise an ineffectiveness claim as part of a new trial motion as defendant was constitutionally entitled to appointment of conflict-free counsel to represent him on appeal. *Garland v. State*, 283 Ga. 201, 657 S.E.2d 842 (2008).

Defendant's petition for habeas corpus was improperly denied on the basis of procedural default as the trial court improperly failed to appoint counsel to represent the defendant on appeal after a motion for new trial was denied as the trial court was aware of the defendant's desire to appeal and the defendant's indigency; the defendant was prejudiced as the defendant's notice of appeal filed pro se was untimely. *Davis v. Frazier*, 285 Ga. 16, 673 S.E.2d 215 (2009).

### Discretion of court.

Because the determination of whether a

defendant was indigent, and thus entitled to have counsel appointed to pursue an appeal, was within the discretion of the trial court, and this determination was not subject to review, the Court of Appeals of Georgia declined to look behind the trial court's determination of indigence. *Breazeale v. State*, 290 Ga. App. 632, 660 S.E.2d 376 (2008).

#### **Counsel of choice.**

Defendant failed to show that the trial court's refusal to appoint the defendant's preferred counsel to represent the defendant was an abuse of discretion because nothing in the defendant's letters to the trial court stating the defendant's dissatisfaction with the defendant's lawyer provided any objective considerations favoring the appointment of defendant's preferred counsel; the defendant's scant testimony at the hearing on the defendant's motion for new trial as to why the defendant preferred in particular the lawyer named in the defendant's letters fell short of providing objective considerations favoring the appointment of the defendant's preferred counsel. *Ware v. State*, 307 Ga. App. 782, 706 S.E.2d 143 (2011).

Defendant was not denied the trial counsel of the defendant's choosing when the trial court declined to continue the trial proceedings after the defendant indicated that the defendant had retained new counsel because the record supported the trial court's conclusion that the defendant requested a continuance for purposes of delay; therefore, the trial court did not abuse the court's discretion in denying the defendant's request for a continuance and instead proceeding with the defendant's appointed counsel who was prepared for trial. *Calloway v. State*, 313 Ga. App. 708, 722 S.E.2d 422 (2012).

Trial court did not abuse the court's discretion when the court disqualified one of the defendant's two lawyers because the lawyer also represented a witness who ultimately testified against the defendant, and the prospects of the lawyer advising the witness about any deal that might be proposed by the state to secure the witness's testimony against the defendant or cross-examining the witness on behalf of the defendant were rife with serious ethical problems. *Heidt v. State*, 292 Ga. 343, 736 S.E.2d 384 (2013).

#### **Defendant failed to show good reason to discharge court-appointed counsel.**

Trial court did not abuse the court's discretion in giving the defendant the option of proceeding pro se and denying trial counsel's motion to withdraw from representation because the trial court conducted a thorough investigation of the allegations, and the defendant was unable to articulate any support for the claim of threats, beyond stating repeatedly the defendant's belief that counsel needed more time. *Billings v. State*, 308 Ga. App. 248, 707 S.E.2d 177 (2011).

#### **Appointment of new counsel not warranted.**

In defendant's convictions for armed robbery, kidnapping, and aggravated assault in connection with robbery of a fast food restaurant, trial court did not err by refusing to appoint new trial counsel after defendant made it known that defendant was dissatisfied with trial counsel and had filed a bar complaint against trial counsel; trial court gave defendant choice between keeping current trial counsel or proceeding pro se, and defendant chose to proceed with current counsel. *Holsey v. State*, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

### **B. Employment of Counsel**

#### **Violation of rights to deny defendant counsel of defendant's own selection.**

Disqualification of defense counsel in a criminal matter was an abuse of discretion, although a client of the defense attorney's law firm was the employer of a witness for the state, because the relationship between the law firm and the firm's client was not reasonably likely to impair a thorough and sifting cross-examination of the witness. *Lewis v. State*, 312 Ga. App. 275, 718 S.E.2d 112 (2011), cert. denied, 2012 Ga. LEXIS 238 (Ga. 2012).

### **3. Time to Prepare**

**Preparation of defendant for trial adequate.** — Defendant failed to demonstrate that trial counsel was ineffective in insisting that the defendant testify without adequate preparation because the defendant's contention that counsel forced

the defendant to testify was refuted by trial counsel's testimony to the contrary at the new trial hearing; trial counsel testified that trial counsel prepared the defendant to testify by telling the defendant to explain about the relationship with the victim, the defendant's location at the time of the crime, why the defendant made a telephone call from a neighbor's house, and various other matters. Although the defendant denied having this discussion, the trial court was authorized to disbelieve the defendant. *Ransom v. State*, 297 Ga. App. 902, 678 S.E.2d 574 (2009).

#### 4. Right to Benefit of Counsel

**Subsequent custodial police interview violated right to counsel.** — While non-custodial and custodial statements were properly admitted, as not vitiating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree. *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

**Question was not a request for counsel.**

Trial court did not err in denying the defendant's motion to suppress because the defendant's question about counsel was equivocal. *Dunlap v. State*, 291 Ga. 51, 727 S.E.2d 468 (2012).

**Right to self-representation.**

Trial court did not err in refusing to appoint the defendant counsel at the motion to suppress hearing and allowing the defendant to represent himself at trial, as the trial court found that the defendant made an informed and voluntary choice to relinquish the right to counsel; the trial court repeatedly informed the defendant of the dangers of self-representation and the defendant was advised of the nature of the charges and the possible punishment. *Horne v. State*, 318 Ga. App. 484, 733 S.E.2d 487 (2012).

**Assistance of counsel denied.** — Trial court erred in denying defendant's motion for an out-of-time appeal of the denial of the defendant's motion to with-

draw the defendant's guilty plea. It was obvious that defendant had attempted to appeal the denial of the defendant's motion to withdraw and that the defendant's request for counsel to help the defendant pursue the defendant's appeal had never been ruled upon; prejudice was presumed and the harmless error analysis did not apply since there had been a total denial of the assistance of counsel. *Stockton v. State*, 298 Ga. App. 84, 679 S.E.2d 109 (2009).

#### 5. Effective Assistance of Counsel

##### A. In General

**Elements of effective and competent counsel.**

The defendant's ineffective assistance of counsel claims lacked merit because the defendant failed to: (1) show prejudice resulting from counsel's alleged ineffectiveness by failing to impeach two witnesses on cross-examination with prior statements they made; and (2) make and, in all likelihood, could not have made, a strong showing that the identification testimony would have been suppressed had trial counsel so moved. *Rivers v. State*, 283 Ga. 1, 655 S.E.2d 594 (2008).

In determining prejudice on an ineffective assistance of counsel claim under *Strickland*, a defendant has to show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; Georgia cases that deviated from that standard by eliminating the reasonable probability language, thereby putting a more stringent burden on the defendant, are thus disapproved. *Miller v. State*, 285 Ga. 285, 676 S.E.2d 173 (2009).

Case was remanded for a hearing on the issue of ineffective assistance of first appellate counsel because the supreme court could not determine from the record whether the defendant was unable to meet the standard for ineffective assistance of first appellate counsel since the trial court's order did not specifically address the issue. *Lewis v. State*, 291 Ga. 273, 731 S.E.2d 51 (2012).

**When issue must be raised.**

When the defendant attempted to raise

an ineffective assistance of counsel claim related to appointed counsel's pre-trial ineffectiveness, but was cut off from making this argument by the trial court, apparently because the trial court mistakenly believed that the claim related to the defendant's own ineffectiveness, the claim was raised at the earliest practicable moment. *Robinson v. State*, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

Defendant's claim of ineffective assistance of counsel with respect to the defendant's guilty plea was waived because it was not raised below. *Blackmon v. State*, 297 Ga. App. 99, 676 S.E.2d 413 (2009).

Trial court did not err in denying the defendant's motion for an out-of-time appeal to vacate a void sentence because the defendant's remedy had to be pursued in a habeas corpus action; the defendant's ineffective assistance of counsel claims could not be resolved by reference to facts contained in the record and had to be developed in a post-plea hearing. *Shelton v. State*, 307 Ga. App. 599, 705 S.E.2d 699 (2011).

**Right does not attach before defendant charged.** — Given the totality of the circumstances, and the defendant's age, education, and knowledge of both the substance of the charge and nature of the rights to an attorney and to remain silent, because the defendant voluntarily gave a statement to a police detective about an uncharged armed robbery, absent any threats, coercion, or promises in exchange for doing so, the statement was admissible. *Swain v. State*, 285 Ga. App. 550, 647 S.E.2d 88 (2007).

**Claim of ineffective assistance not preserved.**

Defendant abandoned claims of insufficient investigation and trial preparation when the claims were merely general and bald assertions, unsupported by argument or citation of authority. *Sampson v. State*, 282 Ga. 82, 646 S.E.2d 60 (2007).

In a battery prosecution, setting aside the defendant's failure to object to a second attorney's representation at trial, a denial from the defendant's first attorney of an alleged promise to represent the defendant after that counsel's suspension had expired gave the trial court sufficient grounds for finding that no such promise

occurred, eliminating the defendant's denial of the right to counsel claim; moreover, inasmuch as the defendant failed to challenge the trial court's finding that the second attorney's representation was effective, the defendant was not entitled to a new trial. *Northington v. State*, 287 Ga. App. 96, 650 S.E.2d 760 (2007).

A defendant's claim that counsel was ineffective in failing to reserve objections to a "level of certainty" jury charge was waived because the defendant did not raise the issue in the defendant's written motion for new trial or at the hearing on the motion. *Olivaria v. State*, 286 Ga. App. 856, 650 S.E.2d 422 (2007).

Because the defendant did not claim below that trial counsel was ineffective for opening the door to impeachment, the defendant failed to timely raise this argument, and thus the claim was waived for purposes of appeal; as a result, the trial court did not err in denying the defendant's motion for a new trial on ineffective assistance of counsel grounds. *Lipsey v. State*, 287 Ga. App. 835, 652 S.E.2d 870 (2007).

Because the record on appeal failed to show that the defendant moved to withdraw a guilty plea due to ineffective assistance of counsel, and the only evidence on this issue was the transcript of the guilty plea hearing, none of the defendant's complaints could be resolved by the transcript, and, thus, the defendant was not entitled to any further relief on the claim. *Duffey v. State*, 289 Ga. App. 141, 656 S.E.2d 167 (2007).

Because the defendant abandoned a claim that counsel was ineffective for failing to call a witness necessary to the defense, as the defendant completely failed to identify the witness, and presented no argument, reference to the record, nor citations of authority to support the claim, that claim presented no basis to support the defendant's amended motion for a new trial. Moreover, even if the claim had not been deemed abandoned, the appeals court found it lacked merit. *Bennett v. State*, 289 Ga. App. 110, 657 S.E.2d 6 (2008).

Because defendant had not sought a new trial on basis of ineffective assistance of counsel, defendant had not preserved

the issue for appellate review; moreover, because defense counsel had not been called upon to explain counsel's actions, they were presumed strategic. *Banks v. State*, 290 Ga. App. 887, 660 S.E.2d 873 (2008).

Defendant's claim that counsel was ineffective for not raising the issue of the validity of the defendant's prior convictions was procedurally barred because the defendant had not raised the issue in the defendant's motion for new trial. The defendant could not resuscitate the issue by raising the issue under the guise of an ineffective assistance of appellate counsel claim. *McGlocklin v. State*, 292 Ga. App. 162, 664 S.E.2d 552 (2008).

Because defendant, through new counsel, could have, but did not, raise an ineffectiveness claim at the hearing on defendant's motion to withdraw a guilty plea, the issue was waived. *Boykins v. State*, 298 Ga. App. 654, 680 S.E.2d 665 (2009).

Although the defendant claimed that trial counsel was ineffective for failing to file a special demurrer regarding the time frame for molestation claims, this issue was not raised in the motion for new trial or the amended motion for new trial filed by appellate counsel, and was never raised or argued in the hearing on the motion for new trial; this constituted a failure to assert the matter at the earliest practicable opportunity and, thus, was a waiver of the right to pursue the issue on appeal. *Sarratt v. State*, 299 Ga. App. 568, 683 S.E.2d 10 (2009).

Because the defendant's allegation of ineffective assistance based on unconstititutional vagueness was not raised on motion for new trial by appellate counsel, who had been appointed following the defendant's conviction, it was waived; the defendant did not raise the purported deficient performance at the hearing on the amended motion for new trial. *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

Defendant's contentions that defendant's trial counsel provided ineffective assistance by presenting inconsistent theories of defense, which did not directly rebut the state's case, and by failing to request a charge on theft by taking as a lesser included offense of armed robbery

were not before the court of appeals to review and were deemed waived because the contentions were not presented to the trial court as bases for the claim of ineffective assistance of counsel, and the trial court did not rule on those claims. *Miller v. State*, 305 Ga. App. 620, 700 S.E.2d 617 (2010).

Because the defendant did not support the assertion that trial counsel was ineffective by citation to the record or argument or even a description of the manner in which the defendant alleged trial counsel's performance was deficient, the enumeration of error was deemed abandoned. *Arroyo v. State*, 309 Ga. App. 494, 711 S.E.2d 60 (2011).

Defendant's enumerations asserting ineffective assistance were deemed abandoned because the enumerations were not supported by argument or by citations to the record or to relevant authority as required by Ga. Ct. App. R. 25(c)(2); to the extent the claims involve trial counsel's decisions as to whether to object to testimony, to introduce evidence, or to request a particular jury charge, the enumerations concerned matters of trial tactics and strategy. *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012), cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Habeas court erred in granting the petitioner's application for habeas corpus relief because the court should not have reached the petitioner's claims of ineffective assistance since those claims had been waived; the petitioner never claimed that appellate counsel committed ineffective assistance by failing to timely raise claims that trial counsel was ineffective. *Tompkins v. Hall*, 291 Ga. 224, 728 S.E.2d 621 (2012).

#### **Ineffective assistance of counsel not properly before appellate court.**

Claims of ineffective assistance were not properly before the court on appeal because they were not raised as ineffective assistance claims in the defendant's motion for new trial. *Bryant v. State*, 282 Ga. 631, 651 S.E.2d 718 (2007).

**Remand warranted where ineffectiveness claim could not be resolved by the appellate record.** — Because the defendant's claim as to the pre-trial inef-

fective assistance of appointed counsel could not be resolved by the record on appeal, the trial court's denial of a new trial as to said claim was reversed, and the case was remanded for a hearing on that claim only. *Robinson v. State*, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

Case was remanded to the trial court for a hearing and determination on the defendant's ineffective assistance claim because the defendant's argument that the defendant was prejudiced by trial counsel's failure to call an expert could not be decided as a matter of law based on the existing record. *Elrod v. State*, 316 Ga. App. 491, 729 S.E.2d 593 (2012).

**Defendant failed to proffer testimony of witness whom defendant argued counsel should have contacted.**

— A defendant's ineffective assistance of counsel argument failed because the defendant had not proffered at the hearing on the defendant's motion for new trial the testimony of the witnesses whom the defendant argued that defense counsel should have contacted. *Williams v. State*, 287 Ga. App. 361, 651 S.E.2d 768 (2007).

**Presumption that appointed counsel properly represented client.**

With regard to defendant's convictions for aggravated child molestation and two counts of child molestation after a bench trial, because defendant failed to call trial counsel at the hearing on defendant's motion for a new trial, defendant was unable to establish that defendant received ineffective assistance of counsel at trial based on trial counsel: (1) failing to adequately investigate the case; (2) failing to present an interview report as evidence; and (3) failing to object to hearsay testimony regarding the victims' abuse allegations; therefore, the presumption remained that trial counsel strategically elected not to offer the interview report as evidence. Further, even if the child victim's statements were not admissible under the child hearsay statute, there was no ineffective assistance since defendant confirmed the statements through his own trial testimony. *Brumbelow v. State*, 289 Ga. App. 520, 657 S.E.2d 603 (2008).

**Acquittal on most serious charges supports effectiveness of counsel.** — Defendant's acquittal on the three most

serious charges strongly supported the conclusion that defense counsel was effective. *Noellien v. State*, 298 Ga. App. 47, 679 S.E.2d 75 (2009).

**Acquittal on number of counts shows effectiveness.** — Trial counsel successfully obtained directed verdicts of acquittal on a number of the charges against defendant, which strongly supported the conclusion that the assistance actually rendered fell within that broad range of reasonably effective assistance. *Sarratt v. State*, 299 Ga. App. 568, 683 S.E.2d 10 (2009).

**Ineffective counsel established as to one charge but not as to other.** —

Because the defendant presented sufficient evidence to show that trial counsel was ineffective in failing to stipulate to the defendant's felon status or to obtain a jury charge limiting the jury's consideration of the defendant's criminal history, such failures prejudiced the defendant's defense sufficiently to require a new trial on a charge of aggravated assault; however, given the defendant's admission to possessing a gun at the time of the altercation, no prejudice resulted to warrant reversal and a new trial on the possession of a firearm by a convicted felon conviction. *Starling v. State*, 285 Ga. App. 474, 646 S.E.2d 695 (2007).

A new trial based on counsel's alleged ineffectiveness was properly denied because the defendant's numerous claims of ineffective assistance of counsel lacked merit; the defendant failed to show that: (1) the number of different instructions sought; (2) any additional investigation or preparation; (3) an objection to evidence of the prior difficulties between the defendant and the victim, and request for a contemporaneous limiting instruction; and (4) a request for an instruction on a defense not alleged, would have changed the outcome of the trial, and the tactical decision as to which defense to pursue was part of a reasonable trial strategy. *Breazeale v. State*, 290 Ga. App. 632, 660 S.E.2d 376 (2008).

Because the defendant failed to show that trial counsel was ineffective in failing to request jury voir dire to determine whether jurors had seen the defendant wearing handcuffs, and because sufficient

evidence supported the defendant's burglary conviction to make a directed verdict of acquittal unnecessary, a motion for a new trial was properly denied. *Brown v. State*, 289 Ga. App. 297, 656 S.E.2d 582 (2008).

Because the trial court was entitled to believe counsel's testimony at the hearing on the motion for new trial that counsel advised the defendant of the right to testify at trial and that counsel met numerous times with the defendant, with ample opportunity to discuss all aspects of the case with counsel, the defendant's ineffective assistance of counsel claim in support of a motion for a new trial had to be rejected. *Warren v. State*, 283 Ga. 42, 656 S.E.2d 803 (2008).

The court of appeals rejected the defendant's ineffective assistance of counsel claim, because, even if: (1) the arrest warrant had been excluded; (2) two witnesses had been cross-examined regarding their identification of the defendant as the shooter, and (3) the nontestifying eyewitnesses' statements had not been relayed to the jury by the police officer, there was no reasonable probability that the defendant would have been acquitted of both crimes. *Bradley v. State*, 283 Ga. 45, 656 S.E.2d 842 (2008).

**Ineffective counsel not shown.** — A new trial was unwarranted because: (1) the decision not to present the defendant's love interest as an alibi witness was clearly strategic, and thus, could not serve as the basis for an ineffectiveness claim; and (2) counsel's alleged failure to specifically object to the victim's testimony on bolstering and not on leading and speculation grounds impermissibly expanded the enumerated error. *Scott v. State*, 288 Ga. App. 738, 655 S.E.2d 326 (2007).

Because the defendant failed to show that any prejudice resulted from trial counsel's failure to investigate potential character witnesses and failure to "re-advise" the defendant of the right to testify following the state's introduction of rebuttal evidence, the defendant was not entitled to a new trial on these grounds. *Thomas v. State*, 282 Ga. 894, 655 S.E.2d 599 (2008).

Despite the defendant's twenty-one ineffective assistance of counsel claims, the

Supreme Court of Georgia analyzed only five of these claims, and found that the defendant failed to show prejudice due to counsel's failure to ask for a continuance, and that the remaining four claims addressed lacked merit. Moreover, the court declined to analyze the deficient performance prong of the defendant's remaining claims of ineffectiveness, as the defendant could not show how any of those deficiencies were prejudicial. *Ruffin v. State*, 283 Ga. 87, 656 S.E.2d 140 (2008).

Defendant's ineffective assistance of counsel claims were without merit, because counsel: (1) adequately explained the decision not to call the defendant's spouse; (2) adequately met with the defendant to discuss the trial strategy and regarding the defendant's decision to waive the right to a jury trial; and (3) had reason to decline objection to the admission of an audio recording of the colloquy between the officers and the defendant at the scene, as that decision supported counsel's trial strategy. *Defrancisco v. State*, 289 Ga. App. 115, 656 S.E.2d 238 (2008).

The defendant's ineffective assistance of counsel claims lacked merit because: (1) the evidence supported the defendant's convictions, and thus a directed verdict was unwarranted; (2) Georgia law did not authorize a judgment notwithstanding the verdict in criminal cases; and (3) the defendant failed to show that counsel's representation and trial strategy was patently unreasonable. *Arellano v. State*, 289 Ga. App. 148, 656 S.E.2d 264 (2008).

Because the defendant failed to show by the record that the trial court's limited consideration of the alleged hearsay statements at issue adversely affected the sentence imposed, the defendant failed to show that trial counsel was ineffective by failing to object to the consideration of said evidence. *Geyer v. State*, 289 Ga. App. 492, 657 S.E.2d 878 (2008).

Despite the various ineffective assistance of counsel claims involving a number of evidentiary issues and the jury instructions issued by the trial court, because the defendant failed to show that the objections made or not made by trial counsel prejudiced the defense, or that the instructions given were not in and of

themselves deficient or correct statements of the law, the claims lacked merit. *Goldley v. State*, 289 Ga. App. 198, 656 S.E.2d 549 (2008).

Defendant failed to establish that trial counsel provided ineffective assistance based on counsel failing to view before trial a videotaped police interview with one of the state's witnesses that, according to defendant, revealed information about what benefits the witness expected from police, and counsel could have used the interview to impeach the witness's credibility. In light of the evidence of defendant's guilt, and the fact that the witness's trial testimony merely corroborated another witness's trial testimony, it was unlikely that the outcome of the trial would have been different had counsel viewed the interview before trial. *English v. State*, 290 Ga. App. 378, 659 S.E.2d 783 (2008).

In prosecution against defendant on two counts of child molestation, because trial counsel was not ineffective in failing to request specific jury charge addressing alleged improper bolstering testimony, present any expert testimony which was not helpful to defense, and elicit available favorable evidence and impeach the victim's testimony, defendant's convictions of related offenses were upheld on appeal; thus, defendant was not entitled to new trial on grounds that trial counsel was ineffective. *Rouse v. State*, 290 Ga. App. 740, 660 S.E.2d 476 (2008).

The court rejected a claim of ineffective assistance of trial counsel when the trial court found the defendant's claims regarding trial counsel's lack of preparation not to be credible, and at trial the defendant repeatedly stated that the defendant was satisfied with the defendant's representation. *Finnan v. State*, 291 Ga. App. 486, 662 S.E.2d 269 (2008).

Based on the testimony given at the hearing on a defendant's motion for new trial, the trial court was authorized to find that defense counsel adequately investigated the case and consulted with the defendant about the trial. An assistant attorney testified to meeting with the defendant at least five or six times; the chief public defender, who handled the trial, testified to meeting with the defendant

more than once and that the defendant was informed about what the attorneys were doing; and the defendant testified that the attorneys had gone over the case with the defendant and discussed the defendant's concerns. *Gary v. State*, 291 Ga. App. 757, 662 S.E.2d 742 (2008).

Defendant was not entitled to a new trial based on a claim that trial counsel was ineffective for failing to request an adverse inference instruction when the defendant failed to return to the courtroom after the first day of trial; appellate counsel declined to have trial counsel testify at the hearing on the motion for a new trial and without any other evidence to the contrary, trial counsel's decision regarding the instruction was presumed to be strategic. *Spragg v. State*, 292 Ga. App. 37, 663 S.E.2d 389 (2008).

Counsel for a defendant was not shown to have been ineffective in the defendant's criminal trial when counsel failed to seek a mistrial upon the admission of testimony that the defendant had committed prior sexual abuse on a family member as the jury was admonished to ignore the remark and the jury was given a curative instruction, and counsel chose not to seek a mistrial as a matter of trial strategy. *Carroll v. State*, 292 Ga. App. 795, 665 S.E.2d 883 (2008).

Defendant did not prove that trial counsel was ineffective when the defendant did not cite to any facts in the record to support the claim, when the defendant failed to present any admissible evidence regarding what an alleged alibi witness would have said if counsel had called the witness to testify at trial, and when contrary to the defendant's claim, counsel cross-examined the victim about past drug convictions. Moreover, even if counsel was ineffective, the evidence of the defendant's guilt was overwhelming, so the defendant did not show prejudice. *Rouse v. State*, 295 Ga. App. 61, 670 S.E.2d 869 (2008).

Defense counsel's failure to object or move for a mistrial based on the state's introduction of evidence relating to a witness's misconduct that fell short of a conviction was not ineffective assistance under circumstances in which counsel's decisions not to object to the state's pur-

suit of the topic of the witness's misdemeanor driving violations, and to attempt to rehabilitate the defendant by showing the minor nature of one of them, were objectively reasonable; when the state broached the subject of the witness's incarceration just before the night in question, it might have gone on to uncover proof of that fact, which would have been admissible as contradictory of the witness's testimony that the witness was in the car with the defendant on the night before the defendant's arrest. Defense counsel could not have been faulted for failing to complete the state's work for it, or for declining to highlight any of this testimony. *Noellien v. State*, 298 Ga. App. 47, 679 S.E.2d 75 (2009).

Defendant failed to establish ineffective assistance based on trial counsel's admission in the opening statement to the jury that the defendant hit the victim, thereby preventing the defendant from arguing that another individual actually assaulted the victim; as the defendant's claim of ineffective assistance related to strategic matters outside of the trial record, defense counsel's theory of the case, trial counsel's testimony was required to evaluate the claim. However, the defendant's trial counsel was not called to testify at the hearing on the motion for new trial, and without trial counsel's testimony, trial counsel's actions were presumed strategic. *Walker v. State*, 298 Ga. App. 265, 679 S.E.2d 814 (2009).

Although the defendant claimed that the defendant's trial counsel was ineffective in failing to request a psychological examination, which allegedly would have shown that the defendant was not competent to knowingly, intelligently, and voluntarily enter a guilty plea, the defendant failed to offer the results of any mental evaluation at either of the hearings on the motion to withdraw the plea; as a result, the defendant could only have speculated that a mental evaluation would have shown that the defendant was not competent to enter a valid plea. Such speculation was insufficient to establish a reasonable probability that any deficient representation resulted in the defendant entering a guilty plea instead of insisting on a trial and did not establish ineffective

assistance of counsel. *Frye v. State*, 298 Ga. App. 415, 680 S.E.2d 431 (2009).

Denial of the defendant's motion to withdraw a guilty plea pursuant to Ga. Unif. Super. Ct. R. 33.12(A) was proper because the defendant failed to establish that but for defense counsel's failure to inform the defendant of the repeal of former O.C.G.A. § 17-10-6, which allowed for a sentence review, the defendant would have insisted on a trial; further, the defendant was aware of the maximum sentence, and the availability of a sentence review did not alter the possibility that the defendant could have potentially been required to serve up to 66 years in prison. The record supported a finding that the defendant entered the plea knowingly, intelligently, and voluntarily. *Vaughn v. State*, 298 Ga. App. 669, 680 S.E.2d 680 (2009).

Defendant failed to establish an ineffective assistance of counsel claim because, inter alia, with regard to counsel's failure to call various witnesses at trial, counsel testified at the motion for new trial hearing that counsel made a strategic decision not to call these witnesses as the witnesses' testimony would have undermined the defendant's justification defense at trial. *Rector v. State*, 285 Ga. 714, 681 S.E.2d 157, cert. denied, 558 U.S. 1081, 130 S. Ct. 807, 175 L. Ed. 2d 567 (2009).

Because there was sufficient evidence to support defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1), counsel's failure to file an appeal could not be deemed ineffectiveness; accordingly, the trial court did not abuse the court's discretion in denying defendant's motion for an out-of-time appeal. *Clark v. State*, 299 Ga. App. 558, 683 S.E.2d 93 (2009).

Because the information in an affidavit provided the magistrate a substantial basis for concluding that probable cause existed for issuing the search warrant, a motion to suppress the search warrant would have been futile; accordingly, defendant failed to show that counsel was ineffective. *Jarrett v. State*, 299 Ga. App. 525, 683 S.E.2d 116 (2009).

Although the defendant's prior convictions might or might not have been actually admissible against the defendant un-

der former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609), trial counsel's belief in that regard was only one of several reasons for advising the defendant not to testify; thus, evidence supported the trial court's finding that such advice was not deficient performance. *Clements v. State*, 299 Ga. App. 561, 683 S.E.2d 127 (2009).

Denial of the defendant's motion to withdraw defendant's guilty plea to possession of cocaine with intent to distribute was appropriate because the defendant did not prove that the defendant received ineffective assistance of counsel. The defendant never testified that, had the defendant proceeded to trial, the defendant wished to take the stand despite the defendant's extensive criminal history, nor did the defendant explain how the defendant or the defendant's lawyer could have made more effective use of a photograph had the defendant had more time to study the photograph prior to trial. *Sims v. State*, 299 Ga. App. 698, 683 S.E.2d 668 (2009).

Trial court did not err in denying defendant's motion for a new trial after the defendant was convicted of statutory rape because defendant did not receive ineffective assistance of counsel; the trial court's determination that defendant's trial counsel articulated a reasonable defense strategy was not clearly erroneous because counsel made a strategic decision that a specific line of investigation was unnecessary since the expected finding from the investigation would not have been helpful to the defense employed, and at trial, counsel presented evidence consistent with the defense strategy. *Burce v. State*, 299 Ga. App. 849, 683 S.E.2d 901 (2009).

After defendant was convicted of aggravated child molestation, child molestation, three counts of aggravated sodomy, and two counts of contributing to the delinquency of a minor, the defendant was not entitled to a new trial based on counsel's performance; counsel's waiver of opening argument and decision to provide a brief closing statement were strategic determinations falling within the realm of trial tactics. Counsel discussed the discovery materials with defendant, prepared a trial notebook, and consulted with defen-

dant while preparing to cross-examine the state's witnesses; counsel was not required to object to properly admitted evidence of similar transactions. *Bazin v. State*, 299 Ga. App. 875, 683 S.E.2d 917 (2009).

Trial counsel's performance was not deficient because trial counsel testified that counsel received and reviewed discovery material provided by the district attorney and viewed the crime scenes, that counsel's investigator interviewed witnesses who gave statements to police, that counsel met with the defendant approximately six times in the months before trial, and that counsel ascertained that family members were willing to be alibi witnesses for the defendant, but counsel elected not to have the family members testify since the defendant acknowledged being at the crime scenes. *Haynes v. State*, 287 Ga. 202, 695 S.E.2d 219 (2010).

Defendant's ineffective assistance claims failed because the defendant could not show deficient performance on the ground that defendant's defense counsel failed to correct the trial court and prosecutor's misstatement regarding the defendant's eligibility to seek review of the defendant's sentence; neither the trial court nor the prosecutor informed the defendant that the defendant was entitled to seek sentence review. *Belcher v. State*, 304 Ga. App. 645, 697 S.E.2d 300 (2010).

Defendant could not succeed on defendant's ineffective assistance claim predicated upon the prosecutor's opening statement because the defendant did not cross-examine the prosecutor at the hearing on the defendant's motion for a new trial or otherwise present any evidence reflecting on what the prosecutor anticipated the evidence would show prior to trial, and, therefore, the defendant could not establish that the prosecutor lacked a good faith basis for the prosecutor's assertions made during the prosecutor's opening statement; the trial court specifically instructed the jury that opening statements were not to be considered as evidence. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Defendant failed to show that defendant received ineffective assistance of counsel due to trial counsel's failure to file

a plea in abatement to dismiss an arrest warrant and an indictment because the allegedly inaccurate and incomplete information in the affidavit supporting the warrant did not suggest an intentional or reckless falsehood on the part of the affiant and was not necessary to a finding of probable cause. *Jones v. State*, 287 Ga. 770, 700 S.E.2d 350 (2010).

Although defendant contended defendant's trial counsel was ineffective because the defendant chose to pursue a theory of defense in which the defendant argued that the defendant was unaware that the defendant was being arrested and, thus, could not have knowingly resisted, instead of pursuing a defense in which the defendant argued that defendant legally resisted an unlawful arrest, counsel's decision as to which theory of defense to pursue is a matter of strategy and tactics; and, as a general rule, matters of tactics and strategy, whether wise or unwise, did not amount to ineffective assistance of counsel. Defendant had not shown that counsel's strategy was so patently unreasonable that no competent attorney would have chosen that strategy. *Zeger v. State*, 306 Ga. App. 474, 702 S.E.2d 474 (2010).

Trial court did not abuse the court's discretion in denying the defendant's motion for a new trial on the ground of ineffective assistance of counsel because the defendant did not show that: (1) the defense counsel was ineffective in failing to file a motion for immunity from prosecution/plea in bar based upon the defendant's claim of self-defense as it was a matter of trial strategy and the defendant could not demonstrate how the failure to pursue such a claim harmed the defendant; (2) the defense counsel was ineffective in failing to request a jury charge on the use of force in defense of habitation; (3) the defense counsel was ineffective in failing to test the thoroughness and good faith of the State of Georgia's investigation; (4) the defense counsel was ineffective in failing to adequately investigate the case or meet with the defendant prior to trial; and (5) the defense counsel was ineffective in failing to interview and cross-examine the prosecution's witnesses as defendant did not establish a reason-

able probability that further interviews and cross-examination would have resulted in a different outcome at trial. *Smith v. State*, 309 Ga. App. 241, 709 S.E.2d 823 (2011), cert. denied, No. S11C1266, 2011 Ga. LEXIS 954 (Ga. 2011).

Defendant's trial counsel was not ineffective for failing to raise the issue of entrapment in a motion for a directed verdict of acquittal because the defendant was not entrapped by law enforcement and the defendant did not admit to committing the charged crimes. Therefore, counsel was not required to make a motion that was without merit. *Logan v. State*, 309 Ga. App. 95, 709 S.E.2d 302, cert. denied, No. S11C1101, 2011 Ga. LEXIS 579; cert. denied, U.S. , 132 S. Ct. 823, 181 L. Ed. 2d 533 (2011).

Because there was independent evidence sufficient to corroborate the testimony given by a codefendant, the cumulative evidence was sufficient for a rational trier of fact to find the defendant guilty of armed robbery; accordingly, counsel's failure to request a charge on accomplice testimony did not constitute deficient performance. *Harris v. State*, 308 Ga. App. 456, 707 S.E.2d 878 (2011).

Defendant's trial counsel did not render ineffective assistance because none of the alleged failures on the part of trial counsel, who was the chief assistant public defender with more than 20 years of criminal experience and 100 jury trials, were so serious as to deprive the defendant of a fair trial, a trial whose result was reliable; even if it could be said that trial counsel was deficient in counsel's performance, the defendant failed to show that, but for counsel's unprofessional errors, there was a reasonable probability that the outcome of the trial would have been different. *Gresham v. State*, 289 Ga. 103, 709 S.E.2d 780 (2011).

During the defendant's trial for child molestation and sexual exploitation of children, defense counsel was not ineffective for failing to properly follow-up on other cases involving the child victims because there was only one other instance involving the children and the allegations were that their mother's new husband had touched the children improperly

while bathing the children; there was no evidence in the record to show that the allegations were false, and it appeared that that was a separate case that was being investigated at the time of trial. *Vaughn v. State*, 307 Ga. App. 754, 706 S.E.2d 137 (2011).

Defendant's trial counsel did not represent the defendant under an impermissible conflict of interest because the representation of a testifying witness in a prior case was by another attorney in the public defender's office, not the defendant's counsel, and the prior representation was concluded and was wholly unrelated to the defendant's case. Furthermore, the defendant's attorney did not impeach the witness because the testimony of the witness was not harmful to the defendant. Finally, the defendant also failed to establish deficient performance based upon any alleged failure of the defendant's attorney to object to the admission of a DVD containing a recording of a five-hour police interview with an accomplice as this decision was part of the defense attorney's trial strategy and the trial court gave a curative instruction to the jury stating that the jury had to disregard any police statements in the recording opining on the character of the defendant. *Moon v. State*, 288 Ga. 508, 705 S.E.2d 649 (2011).

Defendant failed to carry the defendant's burden of showing that trial counsel was ineffective for stipulating to the admissibility of a statement because the defendant failed to make a strong showing that the defendant's statement would have been suppressed had counsel made the motion. *Arellano-Campos v. State*, 307 Ga. App. 561, 705 S.E.2d 323 (2011), cert. denied, No. S11C0801, 2011 Ga. LEXIS 484 (Ga. 2011).

Defendant did not demonstrate either a Fifth Amendment or Sixth Amendment violation because the defendant made no showing of deficient performance by appointed defense counsel and pointed to no particular instance manifesting a conflict with counsel; because counsel did not entirely fail to subject the prosecution's case to meaningful adversarial testing, the defendant was not constructively denied counsel. *Smith v. State*, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

In light of the defendant's statements to the police that placed defendant at the scene of a crime and showed that defendant carried a gun, defendant was not prejudiced by trial counsel's explanation of defendant's right to testify and explanation regarding the potential benefits of testifying. *Lytle v. State*, 290 Ga. 177, 718 S.E.2d 296 (2011).

Because a search warrant affidavit established probable cause even without the representation that the affiant saw the informant buy drugs from the defendant, and because the state introduced sufficient corroborating evidence of an accomplice's testimony that the drugs found in the basement of the house belonged to defendant, the defendant failed to show that trial counsel was ineffective in failing to file a motion to suppress or request a jury charge on accomplice testimony. *Dickerson v. State*, 312 Ga. App. 320, 718 S.E.2d 564 (2011).

Because the testimony by defendant's accomplices, a confidential informant, and the officer who participated in the drug sale, in conjunction with the audio and video tapes of the transaction, overwhelmingly established defendant's guilt, there was no reasonable probability that the outcome of the trial would have been any different; consequently, defendant failed to show that trial counsel was ineffective. *Williams v. State*, 312 Ga. App. 693, 719 S.E.2d 501 (2011).

Defendant did not receive ineffective assistance of trial counsel, despite any deficient performance in counsel's lack of diligence in obtaining witness three's (W3) testimony at trial as the outcome of the trial would not have been different if W3's pre-trial testimony had been admitted since it: (1) would have contradicted the defendant's testimony that witness one (W1) told the victim not to stab the defendant; (2) would have corroborated witnesses one's (W1) and two's (W2) testimony that they did not see the victim stab the defendant; and (3) would not have established that W1 and W2 saw the victim with a knife during the altercation. *Hill v. State*, 291 Ga. 160, 728 S.E.2d 225 (2012).

Defendant failed to prove ineffective assistance of counsel because defendant did

not show that the result of the defendant's trial would have been different if the defense counsel had provided argument to support a motion for directed verdict, or if the counsel had been fully aware of the defendant's immigration status. *Medrano v. State*, 315 Ga. App. 880, 729 S.E.2d 37 (2012).

Defendant was not entitled to a new trial based on counsel's ineffectiveness because defendant gave counsel no information (in support of defendant's self-defense claim) to conduct an investigation of the victims' alleged prior violent acts. *Moreno-Rivera v. State*, 291 Ga. 336, 729 S.E.2d 366 (2012).

Defendant failed to show that trial counsel was ineffective because counsel made a strategic decision not to make a frivolous objection to identification testimony, failure to object to admissible evidence was not ineffective assistance, and a motion to sever defendant's trial from that of a codefendant would not have been successful. *Jackson v. State*, 316 Ga. App. 80, 729 S.E.2d 404 (2012).

Trial counsel was not ineffective for failing to present a meritless motion for a directed verdict because the evidence established that the defendant was guilty of both armed robbery and possession of a firearm in the commission of a felony, and failing to object to an officer's opinion testimony identifying the defendant in a store security videotape, because the defendant's identification did not rest entirely on the videotape identification since a custodian identified defendant in a pre-trial photographic lineup. *Bryson v. State*, 316 Ga. App. 512, 729 S.E.2d 631 (2012).

Trial counsel was not ineffective for failing to obtain criminal histories of the state's witnesses prior to trial because there was no showing that any state witness had such a history to discovery; nor was trial counsel found to be ineffective for failing to object when the victim sat outside the courtroom with an assistant district attorney and a bailiff because there was no indication that the victim was coached. *Ashmid v. State*, 316 Ga. App. 550, 730 S.E.2d 37 (2012).

Trial counsel was not ineffective for failing to object to the testimony of the fire chief and the victim's boyfriend about

what they overheard on speaker phone on the way to the hotel after the fire, because the testimony was admissible and thus, could not support such a claim. *Crawford v. State*, 318 Ga. App. 270, 732 S.E.2d 794 (2012).

## B. Obligations of Counsel

### Joint representation.

With regard to defendant's convictions for first degree arson, criminal damage to property in the second degree, threatening a witness in an official proceeding by unlawfully causing economic harm to a family member, and use of intimidation with the intent of influencing a witness to change her testimony in an official proceeding, defendant was not denied the right to legal representation free from conflicts of interest because defendant's attorney also represented codefendant as defendant's alibi defense was not inconsistent with codefendant's, rather, the alibis were corroborative of each other and mutually supportive since defendant and codefendant both stated that each returned to codefendant's house without incident and defendant thereafter went to defendant's parent's house. The defenses were synergistic rather than antagonistic, and the representation by the same attorney did not give rise to any conflict of interest, potential or actual. *Shelnutt v. State*, 289 Ga. App. 528, 657 S.E.2d 611 (2008), cert. denied, No. S08C0977, 2008 Ga. LEXIS 518 (Ga. 2008).

Habeas court did not err in granting the appellee's petition for writ of habeas corpus because there was no error in the habeas court's finding of an actual conflict of interest that adversely affected plea counsel's performance since the fact that the codefendant alone was paying counsel's fees created a strong incentive for counsel to prioritize the codefendant's interests in the matter over the appellee's interest, and counsel not only failed to pursue an alternative defense theory on behalf of the appellee, counsel failed even to recognize the possibility that one could exist; even though the appellee and the codefendant pursued a unified defense in that their accounts of the incident were consistent, the record reflected that the appellee was the less culpable of the two

in the crime, as it appeared that the appellee's participation was limited to the role of a passive witness who happened to be driving when the codefendant initiated the brief, apparently unpremeditated interaction with the victim. *State v. Mamedov*, 288 Ga. 858, 708 S.E.2d 279 (2011).

#### **Advising on the right to testify.**

No Georgia authority existed for expanding the constitutional obligation to advise the defendant of the right to testify to require counsel to "re-advise" the defendant of the right to testify after the state presented rebuttal evidence. *Thomas v. State*, 282 Ga. 894, 655 S.E.2d 599 (2008).

Defense counsel was not ineffective for advising a defendant not to testify on the defendant's own behalf because the defendant lied to counsel about two other men killing the victim and defense counsel found that the evidence did not support that claim. *Hamilton v. State*, 297 Ga. App. 47, 676 S.E.2d 773 (2009).

Defendant failed to make a case for the ineffective assistance of trial counsel because trial counsel could hardly be found to be deficient for not considering the defendant as a key witness in the defendant's own defense and for having to move forward with defendant's defense without the defendant's cooperation; trial counsel testified that counsel went to the jail to visit the defendant perhaps two or three times and then ceased to do so because the defendant refused to answer most of counsel's questions, would not give counsel defendant's version of events, would not help with the defense, and told counsel that the defendant did not want to talk to counsel. *Sanford v. State*, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, U.S. , 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011).

Defendant failed to show that defense counsel's performance was deficient regarding advising defendant as to defendants' right to testify because counsel's advice to defendant not to testify constituted trial strategy. *Smith v. State*, 306 Ga. App. 693, 703 S.E.2d 329 (2010).

Trial counsel was not ineffective for advising the defendant not to testify because the defendant acknowledged that counsel told the defendant that the defen-

dant would cause more damage to the defendant's case if the defendant testified and acknowledged trusting counsel thereby choosing not to testify; even assuming that trial counsel did advise the defendant that the defendant could be impeached by certain evidence and that such advice was incorrect, the defendant did not show that the defendant was prejudiced thereby because the defendant never said what the defendant's testimony would have been had the defendant testified at trial. *Johnson v. State*, 290 Ga. 382, 721 S.E.2d 851 (2012).

#### **Advising on the right to jury trial.**

On a claim that trial counsel was ineffective in advising a defendant to waive the right to a jury trial, the proper inquiry is whether the defendant has demonstrated a reasonable probability that the outcome of the proceeding would have been different had the defendant not waived the right to a jury trial on advice of counsel. Given the strength of the evidence against the defendant, the defendant failed to demonstrate a reasonable probability that the outcome of the trial would have been different if tried before a jury; accordingly, the defendant's claim that counsel was ineffective in advising the defendant to waive a jury trial failed. *Hendrix v. State*, 284 Ga. 420, 667 S.E.2d 597 (2008).

In a defendant's prosecution for criminal trespass, ineffective assistance of counsel was not shown because trial counsel testified that counsel had discussed the issue of whether or not to waive a jury trial in counsel's initial consultation with the defendant and the defendant's parent and received no indication that the defendant did not understand the defendant's rights. *Thomas v. State*, 297 Ga. App. 416, 677 S.E.2d 433 (2009).

**Advice to waive jury trial.** — Counsel was not ineffective for advising a murder defendant to waive the right to a jury trial. This advice was based on reasonable trial strategy, as defendant testified that counsel believed that a judge, having been exposed to cases involving similar violence, would be more lenient than a jury; moreover, the defendant's acquittal of murder and conviction on the lesser offense of voluntary manslaughter strongly

supported the conclusion that counsel was effective, and the defendant was advised by the trial court that the decision to waive a jury trial rested with the defendant. *Smith v. State*, 291 Ga. App. 725, 662 S.E.2d 817 (2008).

**Failure to challenge arrest warrant.** — Defendant's plea counsel did not render ineffective assistance of counsel by failing to challenge the legality of arrest warrants because all four of the supporting affidavits unquestionably satisfied the requirements of O.C.G.A. § 17-4-41(a), and based on the information provided in the supporting affidavits, the officer in the case supplied the issuing magistrate with sufficient information to support an independent finding that probable cause existed for the issuance of the warrants; the defendant failed to demonstrate that the defendant's plea counsel's failure to challenge the legality of the warrants prejudiced the defendant because even if counsel had challenged the warrants and was able to suppress any inculpatory statement the defendant made, there was nothing to suggest that the defendant's guilty plea resulted from such a statement. *Murray v. State*, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

**Failure to challenge indictment.**

In a child molestation prosecution, since the defendant did not show that the state could have identified a specific date of the crimes in the indictment, or that the state's failure to do so prejudiced the defense, trial counsel's failure to pursue a special demurrer to the indictment did not effect the outcome of the trial and hence was not ineffective assistance. *Stillwell v. State*, 294 Ga. App. 805, 670 S.E.2d 452 (2008), cert. denied, No. S09C0493, 2009 Ga. LEXIS 222 (Ga. 2009).

Trial counsel was not ineffective in failing to challenge the felony murder count of an indictment because the indictment contained sufficient facts to put the defendant on notice that the defendant was accused of the death of the victim as a result of an aggravated assault when the indictment alleged a specific, offensive use of the defendant's hands and feet and that when the defendant's hands and feet were used in a particular way they were objects which were likely to and actually did

result in serious bodily injury; the absence of self-defense, like general intent, did not have to be expressly alleged in an indictment, and even if some such allegation were necessary, language in the indictment asserting that defendant acted unlawfully and contrary to the laws of the state, the good order, peace and dignity thereof was sufficient. *Lizana v. State*, 287 Ga. 184, 695 S.E.2d 208 (2010).

Defendant's ineffective assistance claims failed because the defendant could not show deficient performance on the ground that defense counsel erroneously advised the defendant to enter a plea of guilty upon a defective indictment since the indictment was valid and sufficient. *Belcher v. State*, 304 Ga. App. 645, 697 S.E.2d 300 (2010).

Defendant failed to show that the defendant received ineffective assistance of counsel due to trial counsel's failure to file a plea in abatement to dismiss an arrest warrant and an indictment because the allegedly inaccurate and incomplete information in the affidavit supporting the warrant did not suggest an intentional or reckless falsehood on the part of the affiant and was not necessary to a finding of probable cause. *Jones v. State*, 287 Ga. 770, 700 S.E.2d 350 (2010).

Trial counsel was not ineffective for failing to challenge the validity of an indictment because pursuant to O.C.G.A. § 17-7-54 the indictment showed that it was a "True Bill," was signed by the grand jury foreperson, and was filed with the clerk's office with the clerk of the court's name prior to the defendant's arraignment, where the defendant and counsel signed the indictment; even if the defendant was able to show that counsel was deficient for failing to challenge an imperfect indictment, the defendant was unable to establish prejudice because the filing of a demurrer would not have prevented the state from reindicting and trying the defendant. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Because the armed robbery count of the indictment sufficiently alleged the elements of armed robbery, trial counsel was not ineffective for failing to challenge the armed robbery charge, and the trial court did not err in denying the defendant's

motion for new trial as to the ineffective assistance claim; that the property was taken from the person or immediate presence of another is necessarily inferred from the allegation of a use of an offensive weapon to accomplish the taking, and the alleged offense of “armed robbery” can be accomplished only via a taking from the person or immediate presence of another. *Patterson v. State*, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Defendant failed to show that trial counsel’s performance was deficient for not filing a demurrer to the count of the indictment charging the defendant with enticing a child for indecent purposes in violation of O.C.G.A. § 16-6-5(a) because the indictment alleged that the defendant enticed the victim to a place and penetrated the victim’s vagina with the defendant’s penis. *Burke v. State*, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Any attempt by trial counsel to file a demurrer to the count of an indictment charging the defendant with child molestation, O.C.G.A. § 16-6-4(a)(1), would have been futile because nothing in the child molestation statute specifically prohibited the state from prosecuting the defendant on the ground that the defendant engaged in sexual intercourse with the victim; while sexual intercourse is not an element of child molestation, an adult’s act of sexual intercourse with a child falls within the parameters of the child molestation statute. *Burke v. State*, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Trial counsel was not ineffective for failing to file a special demurrer to the indictment because the defendant did not show that the length of the period in which the indictment alleged the crimes were committed materially affected the ability to present a defense; the charges against the defendant were based on funds the defendant retained, which were disbursed to the defendant on different dates and which related to the representation of specific indigent defense clients. *Clarke v. State*, 317 Ga. App. 471, 731 S.E.2d 100 (2012).

#### **Failure to request a change of venue.**

Trial counsel’s failure to seek a change

of venue on the ground of pretrial publicity as ineffective assistance of counsel failed since the only pretrial publicity shown in the record was a single newspaper article published the week before trial since there was no evidence that the trial’s setting was inherently prejudicial or that the jury selection process showed actual prejudice. *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Trial counsel was not ineffective for failing to object to venue. *Flanders v. State*, 285 Ga. App. 805, 648 S.E.2d 97 (2007).

**Failure to object to venue.** — Trial counsel’s failure to object to venue could not constitute grounds for ineffective assistance because the state established venue. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

#### **Failure to move to sever.**

Defendant did not show that defense counsel was ineffective and thus was not entitled to withdraw the defendant’s guilty plea; defense counsel did not file a motion to sever because a codefendant’s motion to sever had already been denied, and even if defense counsel’s failure to interview certain witnesses was deficient, the defendant did not show that but for the allegedly deficient performance the defendant would have proceeded to trial. *Moon v. State*, 286 Ga. App. 360, 649 S.E.2d 355 (2007).

Counsel’s failure to seek severance of the defendant’s trial from that of the driver of a car in which drugs were found did not constitute ineffective assistance. Trial counsel testified that counsel wanted the driver in the case so that counsel could “blame the drugs on” the driver, and this strategic decision did not constitute deficient performance. *Gresham v. State*, 295 Ga. App. 449, 671 S.E.2d 917 (2009).

In a defendant’s prosecution for malice murder and cruelty to children, trial counsel was not ineffective for failing to move to sever the defendant’s trial from that of the codefendant, the parent of the five-year-old victim, as such a decision was a matter of trial strategy and trial counsel was able to cross-examine the parent as to any hearsay statements regarding the defendant’s prior difficulties with the victim. *Wright v. State*, 285 Ga. 57, 673 S.E.2d 249 (2009).

In a defendant's prosecution for armed robbery, trial counsel was not ineffective due to the abandonment of a motion to sever the defendant's trial from that of a codefendant. Defendant argued that severance from the defendant's codefendant would have prevented the introduction of a phone call made from the codefendant's phone to a taxi service from which a taxi driver who was robbed was dispatched, however the evidence would have been admissible against the defendant regardless of severance because the phone call had been made in furtherance of a conspiracy. *Troutman v. State*, 297 Ga. App. 196, 676 S.E.2d 836 (2009).

Even if defense counsel's withdrawal of a motion to sever could be considered deficient performance, the defendant failed to establish ineffective assistance of counsel because the defendant failed to show that the defendant was prejudiced as the count the defendant argued should have been severed was against the defendant's codefendant, and the defendant failed to point to any evidence in the record that could plausibly support the defendant's contention that the jury might not have believed that the defendant, who was charged with armed robbery along with the codefendant, was not involved in the burglary that the codefendant was charged with committing. *Killings v. State*, 296 Ga. App. 869, 676 S.E.2d 31 (2009).

Defendant failed to show that defendant's trial counsel rendered ineffective assistance by failing to file a motion to sever defendant's trial from that of the codefendants because a motion to sever would have been futile since one of the codefendants filed a motion to sever the trial, and the motion was denied. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Defendant was not denied effective assistance of counsel, even though defendant's trial counsel failed to object to the joining of the defendant and the codefendant for trial, because trial counsel testified that the counsel had found no legal basis upon which to object to the joinder of the defendant's case with that of the codefendant. Furthermore, the trial counsel testified that the counsel did not object to

the joinder or move later for severance as a matter of trial strategy because counsel believed that having the defendant tried with the codefendant enhanced the counsel's strategy of placing the blame on the codefendant as the codefendant gave a statement to the police that all of the narcotics found by the police belonged to the codefendant. *Smith v. State*, 309 Ga. App. 889, 714 S.E.2d 593 (2011).

Trial counsel's failure to renew a motion to sever did not constitute deficient performance because the strategic decision fell within the wide latitude of presumptively reasonable conduct engaged in by trial attorneys; counsel testified that counsel did not renew the motion to sever because counsel had impeached the codefendant on cross-examination and believed that the trial court would not grant severance at that stage of the proceedings. *Glass v. State*, 289 Ga. 706, 715 S.E.2d 85 (2011).

Trial counsel did not render ineffective assistance by failing to move to sever the defendant's case from that of the codefendant because counsel testified that counsel did not move to sever since counsel believed that if the two defendants were tried together, the chances of the codefendant implicating the defendant would diminish; trial counsel further testified that counsel thought the dangers of severance outweighed any benefits and that, even with the benefit of hindsight, counsel would have made the same decision. *Anderson v. State*, 311 Ga. App. 732, 716 S.E.2d 813 (2011).

Defendant failed to show either that trial counsel performed deficiently in failing to request a bifurcated trial on the charge alleging possession of a firearm by a convicted felon or that the defendant was prejudiced because trial counsel chose as part of the trial strategy not to seek bifurcation, and due to the lack of evidence, the trial court granted a directed verdict on the firearm possession count. *Newkirk v. State*, 290 Ga. 581, 722 S.E.2d 760 (2012).

Trial counsel's failure to move to have the charge of possession of a firearm during the commission of a felony tried separately did not amount to ineffective assistance as the possession charge was an underlying felony for the felony murder

counts and, therefore, bifurcation was not authorized. *Leonard v. State*, 292 Ga. 214, 735 S.E.2d 767 (2012).

**Failure to request a competency hearing.**

Because: (1) the record did not demonstrate that the defendant's sanity or competency was or should have been a significant issue at trial; and (2) the defendant failed to support an assertion that competency should have been raised, the defendant failed to prove the prejudice prong of an ineffective assistance of counsel claim due to counsel's failure to request an independent psychiatric examination. Thus, a new trial on this ground was unwarranted. *Jennings v. State*, 282 Ga. 679, 653 S.E.2d 17 (2007).

In an armed robbery prosecution, defense counsel was not ineffective for not evaluating the defendant's competency as: (1) the defendant had been evaluated in connection with another case and found competent; (2) a forensic evaluator met with the defendant and told counsel the defendant would be found competent; and (3) counsel testified that although the defendant's behavior was odd, the defendant was able to communicate and discuss trial issues with counsel. *Shabazz v. State*, 293 Ga. App. 560, 667 S.E.2d 414 (2008).

Habeas court correctly concluded that ineffective assistance of trial counsel could not be used to excuse the procedural default of the petitioner's claim that the petitioner was mentally incompetent during trial because the information that trial counsel then had available to them, including the information that trial counsel unreasonably failed to obtain, would not have led constitutionally effective counsel to pursue a claim of incompetence to stand trial and would not be reasonably probable to have resulted in a finding that the petitioner was incompetent had such a plea been pursued; the petitioner failed to prove that trial counsel rendered ineffective assistance regarding the petitioner's competence to stand trial because trial counsel withdrew the petitioner's plea of incompetence only after satisfying themselves that counsel was able to communicate effectively with the petitioner, and the trial court had an extensive opportunity to observe the petitioner in pre-trial

and trial proceedings and to interact directly with the petitioner, and the court did not see sufficient indications of incompetence to pursue further evaluation. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

Trial counsel was not ineffective for failing to assess the defendant's competency to stand trial as counsel observed nothing that caused counsel to believe that the defendant was not competent. *Brinkley v. State*, No. A12A2322, 2013 Ga. App. LEXIS 169 (Mar. 11, 2013).

**No error in failing to conduct competency hearing.** — Trial court did not err in failing sua sponte to conduct a competency hearing to determine whether the defendant knowingly and intelligently waived the defendant's right to counsel because the information available and evidence presented to the trial court prior to trial provided no real indication that the defendant was incompetent to waive the defendant's right to counsel. *Walker v. State*, 288 Ga. 174, 702 S.E.2d 415 (2010).

**Failure to seek to redact portion of prior plea.** — Trial counsel was ineffective in failing to seek to redact the portion of a defendant's first offender plea that related to carrying a concealed weapon. The plea to carrying a concealed weapon, a misdemeanor, was not an element of the current charge of the possession of a firearm by a first offender probationer under O.C.G.A. § 16-11-131(b). *Cobb v. State*, 283 Ga. 388, 658 S.E.2d 750 (2008).

**Failure to file motion to suppress.**

In a child molestation case involving the defendant's 13-year-old child, defense counsel was not ineffective for not requesting that the trial court determine the reliability of the victim's videotaped statement under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) or for not objecting to the statement's admission; the victim spontaneously told the victim's foster mother about the incidents when the victim was upset, and the victim repeatedly expressed love for the defendant and a desire not to get the defendant into trouble. *Foster v. State*, 286 Ga. App. 250, 649 S.E.2d 322 (2007), cert. dismissed, 2007 Ga. LEXIS 875 (Ga. 2007).

Because a motion to suppress the evi-

dence seized from the vehicle that the defendant and the defendant's cohorts were riding in would have been futile, as the evidence showed they abandoned the vehicle on foot after being involved in a high-speed chase with police, the defendant's trial counsel could not have been ineffective in failing to file the motion. *Skaggs-Ferrell v. State*, 287 Ga. App. 872, 652 S.E.2d 891 (2007).

Defense counsel was not ineffective for not seeking to suppress the evidence seized in the search of the defendant's home based upon the alleged insufficiency of the search warrant affidavit; there was no showing that the information in support of the warrant was patently false or that there was any intent to mislead the judge in seeking the search warrant. *Bryant v. State*, 282 Ga. 631, 651 S.E.2d 718 (2007).

Despite ineffective assistance of counsel claim being raised for the first time on appeal, the appeals court found that the claim, which was based on counsel's failure to file a motion to suppress challenging the admission of a juvenile's purported confession to the police, required remand to the trial court for an evidentiary hearing to determine whether the result of the proceeding would have been different if a motion to suppress had been granted. In the Interest of J.T., 289 Ga. App. 248, 656 S.E.2d 580 (2008).

A defendant had not shown that counsel was ineffective for failing to attempt to suppress the defendant's videotaped statement: even if the defendant had sufficiently articulated a desire to have counsel present, the defendant had waived the right by initiating discussion with police without any further prompting or interrogation by them; furthermore, the videotape supported the conclusion that the defendant was not prevented by any intoxication from knowingly waiving the defendant's Miranda rights and giving a voluntary statement. *Stanley v. State*, 283 Ga. 36, 656 S.E.2d 806 (2008).

Counsel was not ineffective for failing to file a motion to suppress a holster when the admission of the holster did not violate the Fourth Amendment. The information in an affidavit contained sufficient information for the magistrate to come to

the commonsense conclusion that evidence of contraband could be found at the defendant's apartment, and an officer saw the holster in plain view in an area in which the officer had a right to be while searching for contraband. *Cobb v. State*, 283 Ga. 388, 658 S.E.2d 750 (2008).

Defendant was rendered ineffective assistance of counsel with regard to defendant's trial and conviction for aggravated assault and drug possession as a result of trial counsel's failure to move to suppress the test results of defendant's urine and blood, and evidence of a tube of cocaine found in the vehicle which defendant was driving, as the bodily fluids were unlawfully obtained from defendant while unconscious and without a warrant, and there was evidence affirmatively showing that persons other than defendant had equal opportunity to possess the cocaine that was found on the floor of the vehicle. *Coney v. State*, 290 Ga. App. 364, 659 S.E.2d 768 (2008).

With regard to defendant's conviction for trafficking in methamphetamine, defendant failed to establish that defense counsel was ineffective for failing to pursue a motion to suppress the evidence found in defendant's room as the evidence showed that a preliminary motion to suppress was filed and that trial counsel concluded that, based on the Fourth Amendment waivers of defendant and others involved, pursuit of the motion would have been fruitless. *Corn v. State*, 290 Ga. App. 792, 660 S.E.2d 782 (2008).

With regard to defendant's convictions for aggravated assault and related crimes, defendant failed to show that trial counsel was ineffective for failing to file motion to suppress victim's pre-trial photographic lineup and subsequent in-court identifications of defendant, as there was no basis upon which trial counsel could have successfully moved to have the identifications suppressed since the photographic lineup was not shown to have been unduly suggestive and in-court identification was unquestionably admissible; thus, there was no possibility that suppression motion would have been successful. *Gibson v. State*, 291 Ga. App. 183, 661 S.E.2d 850 (2008).

With regard to defendant's conviction

for robbery by sudden snatching, defendant failed to establish that defendant was rendered ineffective assistance of counsel for failing to file a motion to suppress based on the patrol officer having no articulable suspicion to stop defendant pursuant to the purported generic car description that was broadcast as defendant failed to make a strong showing that the motion to suppress would have been granted on the asserted ground. *Cray v. State*, 291 Ga. App. 609, 662 S.E.2d 365 (2008).

With regard to defendant's conviction for possession of marijuana with the intent to distribute, even if defendant had not waived the issue of defense counsel being ineffective for failing to file a motion to suppress, the challenge was meritless since the search warrant properly named the package the police sought to seize, which defendant picked up at a mailing store, and the warrant did not need to name defendant's vehicle, which defendant entered into with the package. *Ferguson v. State*, 292 Ga. App. 7, 663 S.E.2d 760 (2008).

With regard to defendant's convictions for possessing cocaine with the intent to distribute, possessing a firearm during the commission of a crime, and numerous other crimes, defendant failed to establish that defense counsel was ineffective for failing to file a motion to suppress with regard to challenging the contraband evidence obtained after the police stopped defendant's vehicle as an officer attempted to stop defendant's vehicle for failing to maintain the traffic lane, which was a valid basis for making a traffic stop. As such, there was no basis to file a motion to suppress the contraband discovered in defendant's vehicle after the stop. *Ray v. State*, 292 Ga. App. 575, 665 S.E.2d 345 (2008).

With regard to defendant's conviction for distributing cocaine, defendant failed to establish that defendant was rendered ineffective assistance of counsel based on defense counsel failing to move to suppress the evidence obtained during a traffic stop as the motion to suppress would have been futile as the evidence showed that the officer had reasonable suspicion if not probable cause to stop the vehicle

based on carefully constructing an orchestrated buy and using a confidential informant. *Beck v. State*, 292 Ga. App. 472, 665 S.E.2d 701 (2008), cert. denied, No. S08C1863, 2008 Ga. LEXIS 922 (Ga. 2008).

Trial counsel was not ineffective for not filing a motion to suppress. The seizure of one defendant did not violate the Fourth Amendment because the seizure was supported by exigent circumstances, and the other defendant lacked standing to contest an officer's search of a garage and had not asserted an ownership interest in a van located in the garage. *Dade v. State*, 292 Ga. App. 897, 666 S.E.2d 1 (2008).

As an officer's statement to the driver of a vehicle that it would be better for the driver if the driver cooperated because a female officer and a drug dog were on the way did not amount to improper coercion, the defendant could not show that it was likely that a renewed motion to suppress on this ground would have been successful, and the defendant thus failed to make the strong showing necessary to establish ineffective assistance. *Darden v. State*, 293 Ga. App. 127, 666 S.E.2d 559 (2008).

With regard to defendant's convictions for child molestation and aggravated sexual battery, the trial court properly rejected defendant's contention that defendant was rendered ineffective assistance of counsel for defense counsel's failure to object to the admission of an indictment evidencing defendant's guilty plea to a prior conviction as such evidence was admissible, and the judgment entered thereon, as a complete record of a witness's criminal conviction for purposes of impeachment. Further, pretermittting whether defense counsel's failure to object to the additional document admitted constituted deficient performance, defendant failed to show prejudice from the alleged deficiency as defendant had already admitted to prior convictions during direct examination. *Daniel v. State*, 292 Ga. App. 560, 665 S.E.2d 696 (2008), cert. denied, 2008 Ga. LEXIS 891 (Ga. 2008).

With regard to a defendant's convictions for child molestation, the trial court properly denied the defendant's motion for a new trial as the defendant failed to show that the defendant was rendered ineffec-

tive assistance of counsel as a result of trial counsel failing to move to suppress the photographic lineup evidence wherein the two victims identified the defendant as the perpetrator. The reviewing court agreed with the trial court that the photographic lineup was not impermissibly suggestive since the lineup depicted six black and white photographs of men of similar race, age, hairstyle and complexion; thus, the defendant failed to prove that there would have been any merit to the motion to suppress. *Mohammed v. State*, 295 Ga. App. 514, 672 S.E.2d 483 (2009).

In an armed robbery prosecution, a warrant issued by a judge in DeKalb County to search the defendant's home gave the correct DeKalb County address and directions to that address, but included a scrivener's error indicating the property was located in Gwinnett County. As that error was not so material as to destroy the validity of the search warrant, trial counsel was not ineffective in failing to move to suppress clothing found pursuant to the warrant. *Fuller v. State*, 295 Ga. App. 439, 672 S.E.2d 438 (2009), cert. denied, No. S09C0749, 2009 Ga. LEXIS 220 (Ga. 2009).

Because the defendant failed to demonstrate the existence of a meritorious Fourth Amendment argument, there was no merit to the argument that trial counsel was ineffective for failing to file a motion to suppress or motion in limine to exclude the evidence obtained from a search of the defendant's apartment. *Williams v. State*, 284 Ga. 849, 672 S.E.2d 619 (2009).

Defendant's armed robbery conviction was upheld on appeal as the defendant failed to show that the defendant was rendered ineffective assistance of counsel as a result of trial counsel failing to move to suppress items found in the defendant's vehicle shortly after the robbery linking the defendant to the crime as the defendant failed to prove that the damaging evidence would have been suppressed if the motion had been made. *Williams v. State*, 295 Ga. App. 639, 673 S.E.2d 30 (2009).

Defense counsel was not ineffective in failing to file a motion to suppress a vid-

eotape of the defendant's encounter with police; since the videotape was properly authenticated, such a motion would have been denied. *Steillman v. State*, 295 Ga. App. 778, 673 S.E.2d 286 (2009).

Because a police officer was authorized to stop defendant's vehicle based on a suspicion that defendant had illegally dumped trash, and because defendant consented to a search of the vehicle, the items seized from the vehicle would not have been suppressed; accordingly, defendant's ineffective assistance claim failed and the trial court properly denied defendant's motion to withdraw defendant's Alford plea. *Bishop v. State*, 299 Ga. App. 241, 682 S.E.2d 201 (2009).

Because the jury was authorized to accept a cashier's identification testimony, because a photographic array was not impermissibly suggestive, and because nearly every weakness in the identification testimony was addressed in trial counsel's closing argument, defendant failed to show that trial counsel was ineffective in failing to file a motion to suppress. *Clowers v. State*, 299 Ga. App. 576, 683 S.E.2d 46 (2009).

Trial counsel was not ineffective for failing to move to suppress evidence of the cocaine the arresting officer found on the floor. Counsel's strategy was to argue that the drug did not belong to the defendant, and the defendant would have had to admit ownership before the defendant could claim that the officer obtained the drug by exceeding the permissible scope of a patdown search. *Hardy v. State*, 301 Ga. App. 115, 686 S.E.2d 789 (2009).

Trial counsel was not ineffective by affirmatively stating that counsel had no objection to the admission of a handgun and bullets seized from a pickup truck the defendant was driving because even if trial counsel waived counsel's motion to suppress the handgun and bullets, it did not prejudice the defendant since the defendant could not succeed on the merits of the motion to suppress; the trial court properly denied the motion to suppress the physical evidence seized from the pickup truck because the search was authorized under the automobile exception to the warrant requirement. *Martinez v. State*, 303 Ga. App. 166, 692 S.E.2d 766 (2010).

Defendant failed to demonstrate that defendant's trial counsel provided ineffective assistance because the defendant could not make the requisite strong showing that had trial counsel filed a timely motion to suppress, a photographic array that was presented to a reserve deputy sheriff who witnessed the crimes would have been suppressed; the photo array did not present an all but inevitable identification of the defendant because an investigator assembled six pictures of men bearing similar characteristics, such as the same race and same general age range, similar facial features and hair styles, the photographs appeared to have been taken from the same distance, and the photographs displayed similar backgrounds. *Smith v. State*, 303 Ga. App. 831, 695 S.E.2d 86 (2010).

Defendant did not carry defendant's burden of showing that trial counsel was deficient for failing to request a hearing on defendant's motion to suppress defendant's custodial statement because counsel participated in a hearing to determine the admissibility of the statement. *Hester v. State*, 304 Ga. App. 441, 696 S.E.2d 427 (2010).

In an armed robbery prosecution, trial counsel was not ineffective for failing to file a motion to suppress cash recovered from a search of the appellant's clothing as the police had probable cause to arrest the appellant after finding the appellant in the area of the robberies and matching the appellant to the description of one of the suspects. Furthermore, trial counsel was not ineffective for failing to file a motion to suppress recordings of an appellant's telephone calls while the appellant was in jail because while O.C.G.A. § 16-11-62(4) prohibited any person from intentionally and secretly intercepting a telephone call by use of any device, instrument, or apparatus, O.C.G.A. § 16-11-66(a) provided an exception to this rule when one of the parties to the communication had given prior consent and that consent was implied based on the statements during the recording that all jail phone calls were recorded or monitored. *Boykins-White v. State*, 305 Ga. App. 827, 701 S.E.2d 221 (2010).

Trial counsel did not render ineffective

assistance by failing to file a second motion to suppress until the morning of trial, and thus failing to secure a transcript of the hearing on the motion because trial counsel thoroughly cross-examined the arresting detective, who admitted that the detective had previously testified to three different versions of the defendant's alleged statement; therefore, even assuming that trial counsel was deficient by failing to secure a transcript before trial to impeach the detective, the deficiency did not prejudice the defendant since the arresting detective admitted to the detective's contradictory statements and, thus, the inconsistencies were known to the jury even though the prior inconsistent testimony was not read verbatim into the record. *Cannon v. State*, 288 Ga. 225, 702 S.E.2d 845 (2010).

Trial counsel's failure to pursue a meritless motion to suppress body armor did not constitute ineffective assistance because the defendant did not make a strong showing that the body armor would have been suppressed had the defendant's counsel pursued a motion to suppress; a police officer had an arrest warrant for the defendant when the officer found the defendant in an apartment hiding in a shower, and even if the officer was not authorized to arrest the defendant outside the jurisdictional limits of the county, the defendant did not introduce evidence at the motion for new trial hearing that the officer lacked probable cause to arrest the defendant or that the defendant had standing to object to the search of the apartment. *Nyane v. State*, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Trial counsel was not effective for failing to file a pre-trial motion to suppress evidence of the defendant's statement to the police based on a violation of *Miranda* because the defendant made no showing that such a motion would have been successful; the defendant spoke English, the interviewing officer informed the defendant of the defendant's *Miranda* rights, and the defendant acknowledged understanding those rights before giving the defendant's statement. *Cuvas v. State*, 306 Ga. App. 679, 703 S.E.2d 116 (2010).

Codefendant did not demonstrate that his trial counsel was deficient for failing to seek suppression of his custodial statement because the codefendant failed to provide a meritorious basis to contest its admission; the codefendant was not a suspect in the crimes at the time of his arrest, he was informed of his Miranda rights, he did not ask for an attorney, and the statement was made without threat of force or promise of reward. *Wilson v. State*, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Evidence supported the trial court's finding that the defendant failed to show that the defendant's plea counsel was ineffective for failing to suppress an inculpatory statement that the defendant allegedly made to the police after the defendant's arrest because, despite the defendant's claim that the defendant made an inculpatory statement that caused the defendant to plead guilty, the trial court had every right to disbelieve defendant's self-serving testimony in favor of counsel's testimony that counsel was not aware of the defendant making any inculpatory statement and that no record of such a statement existed in any of the files the state provided to the counsel; in addition, there was no mention of such a statement during the defendant's guilty-plea hearing. *Murray v. State*, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

Defendant's trial counsel was not deficient for failing to file a motion to suppress evidence because the defendant failed to show that police officers lied under oath during the trial; therefore, the defendant was unable to show that, if defense counsel had filed a motion to suppress on that basis, the trial court would have granted the motion. *Bass v. State*, 309 Ga. App. 601, 710 S.E.2d 818 (2011).

Defendant failed to establish that there was a reasonable probability that, but for the alleged deficiencies of trial counsel, the outcome of the trial would have been different because the defendant could not show prejudice due to trial counsel's failure to file a motion to suppress the approximately \$1,500 discovered when the defendant was searched; even if the evidence had been excluded, the remaining evidence adduced at trial was overwhelming. *Lowe v. State*, 310 Ga. App. 242, 712 S.E.2d 633 (2011).

Trial counsel did not render ineffective assistance by failing to move to suppress evidence found on the defendant's person because any motion to suppress would have been without merit; when the officers lawfully approached and questioned the defendant, the smell of alcohol on the defendant's person and emanating from a cup, and the officers' earlier observations of the defendant staggering and stumbling in the middle of the roadway, gave the officers probable cause to arrest the defendant for unlawfully walking upon the roadway while under the influence of alcohol, O.C.G.A. § 40-6-95, and the cocaine and digital scales subsequently found in the defendant's pockets were discovered pursuant to a lawful search incident to an arrest. *White v. State*, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

Defendant failed to establish that trial counsel's failure to timely file a motion to suppress evidence a police officer seized from the defendant's vehicle prejudiced the case because the warrantless search of the vehicle was lawful under the automobile exception to the warrant requirement; the objective facts known to the officer after the car was lawfully stopped gave the officer probable cause to believe that the car contained contraband, and those facts included the smell of marijuana in the car, flakes of what the officer suspected to be marijuana on the floorboards of the car, and the defendant's visible agitation during the traffic stop. *Brown v. State*, 311 Ga. App. 405, 715 S.E.2d 802 (2011).

Trial counsel was not deficient for failing to suppress the eyewitnesses identifications of the defendant because trial counsel could not have suppressed the evidence on the theory that various witnesses' accounts of the shooter were inconclusive or inconsistent since issues regarding the eyewitnesses' credibility were for the jury to resolve; the defendant made no argument on appeal that the pretrial identification procedures used by the police were unduly suggestive. *Funes v. State*, 289 Ga. 793, 716 S.E.2d 183 (2011).

Trial counsel did not perform deficiently by failing to renew the motion to suppress after evidence was presented at trial because there was no evidence that a re-

newed motion would have been granted or that the defendant suffered prejudice as a result of counsel's performance. *Gibson v. State*, 290 Ga. 6, 717 S.E.2d 447 (2011).

Defendant failed to show that trial counsel was ineffective by failing to move to suppress identification evidence and testimony because the admission of a deceased victim's identification statement was made the subject of a motion in limine filed by trial counsel and, thus, there could be no error as counsel did not fail to seek the exclusion of the admission of the victim's identification; the victims' identification of the defendant was merely one of the credibility of eyewitnesses to the incident, which had to be resolved by the trier of fact. *Gandy v. State*, 290 Ga. 166, 718 S.E.2d 287 (2011).

Trial counsel was not deficient in failing to challenge the search of the defendant's computer because no basis existed under O.C.G.A. § 17-5-24 for suppressing the results of forensic computer analysis; the analysis required expert skill, and the computer examination was conducted at the direction of Georgia peace officers to enable the officers to complete the officers' own investigation. *Twiggs v. State*, 315 Ga. App. 191, 726 S.E.2d 680 (2012).

Trial counsel was not ineffective for failing to file a motion to suppress because probable cause to arrest the defendant and to search the defendant incident to that arrest had been shown on undisputed facts; therefore, the defendant could not make the requisite strong showing that a motion to suppress the evidence found during that search would have been meritorious. *Coney v. State*, 316 Ga. App. 303, 728 S.E.2d 899 (2012).

Trial counsel's failure to move for suppression of an in-court identification by the victims did not amount to ineffective assistance of counsel, because the identifications were appropriate given that the victims had ample opportunity to see the defendant at the scene of the crime and there were not impermissibly suggestive pre-trial identification procedures involved in the case. *Taylor v. State*, 318 Ga. App. 115, 733 S.E.2d 415 (2012).

#### **Failure to file special demurrer.**

Trial counsel was not ineffective for failing to file a special demurrer requiring

the state to allege a specific date on which the alleged offenses occurred. Because defendant did not allege the defense of alibi, the specificity of dates would not have been helpful. *Stanford v. State*, 288 Ga. App. 463, 654 S.E.2d 173 (2007), cert. denied, 2008 Ga. LEXIS 461 (Ga. 2008).

#### **Failure to raise a merger issue.**

Plea counsel performed deficiently in failing to argue for the merger of the defendant's convictions and sentences for armed robbery, O.C.G.A. § 16-8-41(a), and aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), because the aggravated assault with a deadly weapon charges did not require proof of a fact that the armed robbery charges did not likewise require, and the defendant's aggravated assault convictions unquestionably merged into the defendant's armed-robbery convictions; the armed robbery counts in the indictment provided that the defendant unlawfully, with intent to commit theft, did take property from the person of the victim, by use of an offensive weapon, and the aggravated assault counts provided that the defendant did unlawfully make an assault upon the person of the victim with a steel rod, a deadly weapon, an object, which, when used offensively against a person, was likely to or actually did result in serious bodily injury, by beating the victim about the head and face with the steel rod. *Murray v. State*, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

Since merger of the defendant's convictions for aggravated assault and armed robbery was not authorized, counsel's failure to pursue a meritless motion could not constitute ineffective assistance. *Mcglasker v. State*, No. A12A2079, 2013 Ga. App. LEXIS 218 (Mar. 19, 2013).

#### **Failure to request continuance.**

In a defendant's prosecution for child molestation, the defendant's counsel was not ineffective for failing to request a continuance when the defendant's roommate, whose whereabouts were unknown for 18 months, suddenly reappeared on the eve of trial because trial counsel had an adequate opportunity to interview the roommate before the trial began and the roommate answered questions as expected based on trial counsel's review of

the roommate's pretrial statements. *Moe v. State*, 297 Ga. App. 270, 676 S.E.2d 887 (2009).

Defendant's convictions for two counts of aggravated child molestation and three counts of child molestation in violation of O.C.G.A. § 16-6-4 were appropriate because the defendant failed to prove that the defendant received ineffective assistance of counsel. The defendant admitted that the defendant did not inform counsel that the defendant wanted to call the defendant's aunt and mother until the day before jury selection and counsel told the defendant that it would probably not be possible to get another continuance; even assuming that counsel could have obtained another continuance, the defendant's counsel was not given an opportunity to testify about why counsel did not attempt to get a continuance or whether there were strategic reasons for not calling the defendant's aunt and mother as witnesses. *Watson v. State*, 299 Ga. App. 702, 683 S.E.2d 665 (2009).

Defendant could not show that defendant's trial counsel's performance fell outside the wide range of reasonable professional conduct when counsel failed to request a continuance or challenge the admission of the defendant's videotaped police interview after the prosecutor did not produce the videotape to the defense until the day of trial because counsel requested and received a continuance, and thus secured an opportunity to review the videotape prior to trial. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Defendant failed to show that defendant's trial counsel's failure to obtain a continuance to challenge fingerprint evidence was the result of deficient performance because the defendant could not show prejudice resulting from the lack of opportunity for expert review of the fingerprint report when no expert testified at the motion for new trial hearing, and without that testimony, the court of appeals could not evaluate whether there was a reasonable probability that the outcome of the proceeding could have been different; the trial court noted in the new trial hearing that counsel's strategy was to contest the occurrence of any kidnapping offense and concede the lesser

crimes, and further analyzing the fingerprint evidence was not material to the trial strategy. *Thornton v. State*, 305 Ga. App. 692, 700 S.E.2d 669 (2010).

Trial counsel was not ineffective for failing to request a continuance to review evidence and have the evidence tested by the defendant's own expert because the defendant presented no evidence at the motion for new trial hearing to support the defendant's bald assertion that there was a reasonable probability that the outcome of the proceeding would have been different had counsel sought a continuance or independent expert testing; even assuming that the defendant could properly raise a claim of ineffectiveness against counsel, the trial court did not err in denying the motion for new trial on that ground. *Walker v. State*, 288 Ga. 174, 702 S.E.2d 415 (2010).

Decision by trial counsel not to move for a continuance after an alibi witness did not appear and could not be located to testify on the defendant's behalf did not show the counsel's ineffectiveness because trial counsel testified that the alibi witness indicated by telephone that the witness did not want to testify and that defense counsel would not like what the witness had to say if counsel forced the witness to testify, and the trial court was authorized to credit counsel's testimony regarding the alibi witness; because trial counsel's investigation revealed that the supposed alibi witness was reluctant, unfavorable, and possibly prepared to commit perjury, the decision not to call such a witness was a reasonable exercise of professional judgment, and the tactical decision to proceed without the alibi witness's testimony was made after consultation with the defendant, who confirmed on the record that counsel agreed with the decision not to request a continuance. *Reeves v. State*, 288 Ga. 545, 705 S.E.2d 159 (2011).

Trial counsel was deficient on the ground that counsel's motion for continuance did not comply with O.C.G.A. § 17-8-25 because the witness in question had not been subpoenaed, and, thus, counsel could not comply with the statute; the defendant did not show that the trial court's denial of the motion for continu-

ance was reversible error and did not demonstrate ineffective assistance of counsel. *Presley v. State*, 307 Ga. App. 528, 705 S.E.2d 870 (2011).

Defendant's counsel was not ineffective for failing to request a continuance after a witness, who would have testified that another person confessed to killing the victim, failed to appear for trial because without some explanation as to why the witness did not appear at trial or some evidence that the witness had been located in the ensuing months, the defendant failed to demonstrate that the witness would testify at trial, and thus failed to carry the burden to show prejudice; the defendant failed to demonstrate that the outcome of the proceeding would have been different because the defendant did not establish that the witness's testimony would have been admissible at trial since there was no evidence that the confessor made the confession spontaneously or that the confessor and the witness were close friends. *Martinez v. State*, 289 Ga. 160, 709 S.E.2d 797 (2011).

**Failure to object when comments made about defendant's silence.**

With regard to convictions for aggravated assault and related crimes, defendant failed to show that trial counsel was ineffective for failing to object or move for a mistrial when a security officer commented on defendant's pre-arrest silence, namely that defendant did not speak up as to owning the type of vehicle used to perpetrate the crimes; even if testimony on defendant's pre-arrest silence had been objectionable, defendant failed to show any prejudice since other evidence showed that defendant drove to police station in defendant's truck and consented to search of that vehicle. *Gibson v. State*, 291 Ga. App. 183, 661 S.E.2d 850 (2008).

Prosecutor's remark was unlikely to be interpreted as a comment on the defendant's failure to testify and was not intended to comment on the defendant's decision not to testify, but was instead intended to address, albeit inartfully, the defendant's closing argument challenging the veracity and motives of those witnesses who were involved in the subject crimes. Thus, the failure of trial counsel to object to the remarks did not constitute

deficient performance. *Rosser v. State*, 284 Ga. 335, 667 S.E.2d 62 (2008).

In a prosecution for battery and aggravated assault, defense counsel's failure to object to a police officer's single gratuitous reference to the defendant's post-arrest silence was not reversible error because, in view of the strong evidence of the defendant's guilt, this error was unlikely to have affected the outcome of the trial. *Crawford v. State*, 294 Ga. App. 711, 670 S.E.2d 185 (2008).

In an armed robbery prosecution, defense counsel was not ineffective in failing to object to the state's questions regarding the defendant's prearrest silence. As the defendant first raised the issue of that silence while testifying, and the prosecutor's questions regarding the defendant's failure to report an alleged crime against the defendant or to seek police protection only incidentally involved a reference to the defendant's silence, any objection would have been meritless. *Dinkins v. State*, 295 Ga. App. 289, 671 S.E.2d 299 (2008).

Trial counsel was not ineffective for failing to object when the state asked the arresting officer if the defendant made a statement while in custody. The testimony was not given to prove the defendant's guilt or innocence, but could be characterized as a narrative recitation of the events surrounding the defendant's arrest by the authorities. *Hardy v. State*, 301 Ga. App. 115, 686 S.E.2d 789 (2009).

Defendant did not receive ineffective assistance of trial counsel when defendant's attorney failed to object to testimony from a detective regarding the defendant's post-arrest silence because although the testimony was improper, and trial counsel was deficient in failing to object, the defendant could not establish that counsel's deficient performance prejudiced the defendant's defense; trial counsel testified that counsel was unable to explain why counsel had not objected to the testimony but confirmed that counsel's failure to do so did not arise from a strategic decision, but the defendant, who aroused the suspicions of a security guard patrolling a high crime area during the late night hours, was caught in actual possession of nearly 240 grams of cocaine

valued between \$8,000 and \$10,000, in addition to possessing a large amount of currency, and the state did not comment further regarding defendant's failure to give a statement, nor did the state make reference to it during closing argument. *Arellano v. State*, 304 Ga. App. 838, 698 S.E.2d 362 (2010)."

Trial counsel's failure to object to the prosecutor's argument that the defendant's failure to come in and speak with police after an arrest warrant issued was evidence of defendant's guilt constituted ineffective assistance because counsel's failure to object arose not from strategy but from counsel's mistaken belief that the argument was not objectionable, and the defendant suffered prejudice as a result of counsel's error; twice during closing the state deliberately and unequivocally argued that the jury could use the defendant's silence against the defendant and view the defendant's failure to come forward and speak with police as evidence of the defendant's guilt, despite the absence of any evidence showing that the defendant was aware that a warrant had issued for the defendant's arrest, and there was no physical evidence linking the defendant to the crimes. *Scott v. State*, 305 Ga. App. 710, 700 S.E.2d 694 (2010).

Trial court did not err in denying the defendant's motion for new trial on the basis of ineffective assistance of counsel because trial counsel's decision not to object to a police officer's passing reference to the defendant's post-arrest silence was a valid exercise of reasonable professional judgment; given the overwhelming evidence of the defendant's guilt, there was no reasonable probability that, but for counsel's failure to object, the outcome of the trial would have been different. *Jackson v. State*, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Counsel's failure to object to the prosecutor's comments on the ground that the prosecutor improperly commented on the defendant's exercise of the defendant's right to remain silent by remarking on the defendant's failure to testify at trial did not amount to deficient performance because the challenged remarks were not improper; the prosecutor made the comments while seeking to persuade the jury

that the defendant's statements and behavior shortly after the crimes were inconsistent with the defendant's theory of self-defense, and the remarks were not intended to comment on the defendant's failure to testify or would have been received as such by the jury. *Lacey v. State*, 288 Ga. 341, 703 S.E.2d 617 (2010).

Trial court's finding that the defendant did not receive effective assistance of counsel due to trial counsel's failure to object to the prosecutor's comments during closing arguments regarding the defendant's decision not to take the stand and testify at trial was not clearly erroneous because appellate counsel never asked trial counsel why trial counsel did not object to the statements; therefore, because trial counsel was never asked to explain the failure to object during the motion hearing, the defendant failed to meet the burden of making an affirmative showing that the purported deficiencies in trial counsel's representation were indicative of ineffectiveness and were not examples of a conscious and deliberate trial strategy. *Herndon v. State*, 309 Ga. App. 403, 710 S.E.2d 607 (2011).

Defendant's claim that trial counsel rendered ineffective assistance by not objecting to pervasive comments on the defendant's pre-arrest silence failed because the defendant made an insufficient showing of prejudice; there was strong evidence of the defendant's guilt of felony murder, including that it was undisputed that the defendant was the only adult caring for the victim when the victim received mortal injuries and that the defense that the victim fell from the bed was not supported by the medical evidence. *Whitaker v. State*, 291 Ga. 139, 728 S.E.2d 209 (2012).

**Failure to object to clearing of courtroom for young victim's testimony.** — With regard to defendant's convictions on two counts of cruelty to children in the first degree and one count of aggravated battery, defendant failed to establish that defense counsel was ineffective for failing to object to the clearing of the courtroom when the child victim testified as defense counsel testified at the new trial hearing that defense counsel did not object to the closing of the courtroom because defense counsel recognized that

the victim was very young and defense counsel believed it to be appropriate under the circumstances. As a result, defense counsel's decision not to object clearly constituted an exercise of reasonable professional judgment. *Glover v. State*, 292 Ga. App. 22, 663 S.E.2d 772 (2008).

**Failure to object to sheriff testifying as witness also acting as bailiff during trial.** — Defendant's trial counsel was ineffective for failing to object to a county sheriff serving as a bailiff during the defendant's trial on charges of, inter alia, arson because the sheriff was a key witness for the state. Even if the sheriff never directly discussed the case with the jurors, the defendant was prejudiced as the sheriff continually associated with the jurors during half the trial and thus denied the defendant the right to a fair trial by an impartial jury. *Bass v. State*, 285 Ga. 89, 674 S.E.2d 255 (2009).

**Failure to object to comment on victim's credibility.** — Defendant failed to establish ineffective assistance of counsel with regard to defendant's trial and conviction for child molestation based on trial counsel's failure to object to certain testimony by the investigating officer that commented upon the victim's credibility as, even though trial counsel did not object, the trial court gave a curative instruction that specifically informed the jury to disregard the officer's testimony commenting on the victim's credibility, which was adequate to correct any harm. *Williams v. State*, 290 Ga. App. 841, 660 S.E.2d 740 (2008).

Defendant did not show that trial counsel was ineffective by failing to object to the state's comment during closing argument regarding an experts' opinion regarding child molestation victims' credibility. Nor did the defendant show that there was a reasonable probability that the outcome of the case would have been different but for the purported deficient performance of trial counsel. *Cobb v. State*, 309 Ga. App. 70, 709 S.E.2d 9 (2011).

**Failure to object to impermissible questions/comments on defendant's pre-arrest silence from prosecution.** — With regard to a defendant's convic-

tions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony, although the defendant's trial counsel was deficient for failing to object to the prosecutor's impermissible questions and comments relating to the defendant's pre-arrest silence regarding the defendant's failure to contact the police to inform the police of the alleged accidental shooting, the defendant was not prejudiced by the deficiency based on the overwhelming evidence of guilt, including eyewitness accounts and evidence that the deceased victim was unarmed, which negated the defendant's accidental shooting and self-defense theories. *Thomas v. State*, 284 Ga. 647, 670 S.E.2d 421 (2008).

**Failure to object to identification of defendant.** — Defendant failed to show that the defendant received ineffective assistance of counsel by failing to object to an in-court identification of the defendant by the aggravated assault victim because the defendant neither asked trial counsel why no objection was made to the in-court identification nor made any showing that the identification would have been suppressed had an objection been made; the defendant made no affirmative showing that the purported deficiency in counsel's representation was indicative of ineffectiveness as opposed to being an example of a conscious, deliberate, and reasonable trial strategy. *Newsome v. State*, 288 Ga. 647, 706 S.E.2d 436 (2011).

Trial counsel did not perform deficiently by failing to object to a convenience-store clerk's allegedly tainted in-court identification of the defendant because the clerk's identification of the defendant had an independent origin, and thus, any objection would have lacked merit; although the clerk did admit to seeing a photograph of the defendant prior to trial, the clerk testified that the in-court identification of the defendant was not based on a photograph but rather on the clerk's recognition of the defendant from the time of the robbery. *Anderson v. State*, 311 Ga. App. 732, 716 S.E.2d 813 (2011).

Defendant did not show ineffective assistance of counsel because the defendant failed to establish prejudice resulting from the defense counsel's failure to file

pretrial motions regarding identification. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

#### **Failure to present expert testimony.**

Defendant's argument that counsel was ineffective for not calling a DNA expert was meritless. The defendant did not produce an expert to testify that the state's DNA evidence was defective, and unlike the case relied upon by the defendant, the DNA evidence was not the sole link between the defendant and the crimes. *Williams v. State*, 284 Ga. 849, 672 S.E.2d 619 (2009).

In a rape and aggravated sodomy case, the trial court properly rejected the defendant's claim that trial counsel was ineffective for not introducing evidence on the adult victim's mental capacity to consent. Because the defendant failed to proffer the testimony of an uncalled witness, the defendant could not prove that there was a reasonable probability that the trial would have ended differently; furthermore, counsel gave a reasonable explanation for not introducing expert testimony in that counsel believed that the victim might have the capacity to consent and that counsel believed that expert testimony on the issue would not sway the jury. *Ravon v. State*, 297 Ga. App. 643, 678 S.E.2d 107 (2009).

Trial counsel's decision not to call an expert was reasonable trial strategy and did not support a claim of ineffective assistance of counsel because trial counsel testified that counsel consulted with an expert, and after weighing the pros and cons of calling an expert witness at trial, counsel decided, as a matter of trial strategy, not to do so. *Wade v. State*, 305 Ga. App. 382, 700 S.E.2d 827 (2010), cert. denied, U.S. , 131 S. Ct. 3066, 180 L. Ed. 2d 893 (2011).

Because the defendant failed to offer proof at a motion for a new trial hearing that the defendant's trial counsel was ineffective in that the counsel failed to elicit sufficient testimony from an expert at a hearing about the defendant's mental abilities and condition when the defendant made a statement to the police, the defendant failed to demonstrate prejudice and the defendant's claim of ineffective

assistance was properly denied. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Since the question of whether someone might be persuaded to give a false confession through persuasive interrogation was not beyond the ken of average jurors and trial counsel set the issue before the jury, counsel was not ineffective for failing to retain an expert whose testimony would have been admissible on the subject. *Humphrey v. Riley*, No. S12X0945, 2012 Ga. LEXIS 1046 (Sept. 10, 2012).

Based on trial counsel's testimony regarding pre-trial consultations with a trauma nurse and a physician, both of whom discounted the suggested alternative explanation for the victim's initial brain injury, trial counsel's strategic decision not to continue hunting for a defense expert, but instead to challenge the state's experts on cross-examination, was not unreasonable and did not constitute deficient performance. *Brown v. State*, 292 Ga. 454, 738 S.E.2d 591 (2013).

#### **Failure to raise inconsistent verdict issue.**

Trial counsel did not render ineffective assistance by failing to object to the jury verdict after the jury found the defendant guilty of burglary and not guilty of the underlying charge of criminal damage to property; Georgia does not recognize an inconsistent verdict rule, which would permit a defendant to challenge the factual findings underlying a guilty verdict on one count as inconsistent with the findings underlying a not guilty verdict on a different count. *Ursulita v. State*, 307 Ga. App. 735, 706 S.E.2d 123 (2011).

**Failure to comply with reciprocal discovery.** — Because any error in the trial court's exclusion of the evidence of the male victim's prior convictions was harmless, the defendant's trial counsel could not have been found ineffective due to an alleged failure to comply with reciprocal discovery. *Skaggs-Ferrell v. State*, 287 Ga. App. 872, 652 S.E.2d 891 (2007).

Defendant had not shown that counsel was ineffective for not engaging in reciprocal discovery under O.C.G.A. § 17-16-1. The defendant offered no evidence that counsel was unprepared or unaware of the salient evidence before trial and had not

shown that the outcome would have been different had counsel opted into discovery. *Anuforo v. State*, 293 Ga. App. 1, 666 S.E.2d 50 (2008).

**Premature filing of notice of alibi.**

— In an armed robbery prosecution, trial counsel was not ineffective for disclosing the defendant's alibi defense before the prosecution filed a demand for notice of alibi under O.C.G.A. § 17-16-5(a) because counsel knew that such a demand was going to be filed, and the defendant was not prejudiced by the premature disclosure. *Fuller v. State*, 295 Ga. App. 439, 672 S.E.2d 438 (2009), cert. denied, No. S09C0749, 2009 Ga. LEXIS 220 (Ga. 2009).

**Failure to object to order appointing judge.**

Trial counsel was not ineffective for failing to object that the order appointing a trial judge had expired by the time the defendant went to trial on a cocaine trafficking charge because the defendant failed to establish that the expiration of the order in any way denied the defendant a fair trial. *Jones v. State*, 294 Ga. App. 854, 670 S.E.2d 506 (2008).

**No obligation to file meritless motions.**

When it would have been meritless for defense counsel to object to portions of the state's closing argument and to reserve objections to the jury charge, the failure to make the objections did not support a claim of ineffective assistance of counsel. *Sampson v. State*, 282 Ga. 82, 646 S.E.2d 60 (2007).

Because trial counsel was not ineffective for failing to make a meritless objection to the introduction of evidence that was deemed relevant, and none of the prosecutor's closing remarks were objectionable in the manner alleged by the defendant on appeal, trial counsel was not found to be ineffective. *Williamson v. State*, 285 Ga. App. 779, 648 S.E.2d 118 (2007).

Defense counsel's failure to demur to the indictment and to request an additional limiting instruction concerning properly admitted similar transaction evidence did not amount to deficient performance, as those actions would have been unavailing and the outcome of the trial

would not have been different but for counsel's alleged omissions. *May v. State*, 287 Ga. App. 407, 651 S.E.2d 510 (2007).

Rape conviction was upheld on appeal as the defendant was not entitled to a new trial based on defense counsel's failure to object to certain testimony from the victim about the defendant's history of selling drugs and failure to subpoena certain medical records, as: (1) testimony from the victim that the defendant gave the victim drugs before some of the sexual encounters between them was admissible as part of the *res gestae*; and (2) the medical records were generally consistent with the victim's testimony, and therefore no prejudice resulted from failing to subpoena them. *Mitchell v. State*, 287 Ga. App. 517, 651 S.E.2d 821 (2007).

Defendant had not shown ineffective assistance of counsel where the stop and search of the defendant's vehicle were authorized by information that the car was stolen, and thus a motion contesting the stop would have been futile, and the defendant had not shown how additional time spent with counsel prior to trial would have benefitted the defendant's defense; also, the defendant in arguing that defense counsel had failed to interview potential witnesses had not identified any witness or proffered testimony that would have been favorable to the defense, and counsel's choice to argue that marijuana did not belong to the defendant instead of arguing that the substance was not marijuana was a strategic decision. *King v. State*, 287 Ga. App. 375, 651 S.E.2d 496 (2007).

Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. *Hampton v. State*, 282 Ga. 490, 651 S.E.2d 698 (2007).

Because the defendant failed to show that defense counsel's performance fell below an objective standard of reasonableness, and the objections the defendant claimed should have been made were deemed meritless, counsel could not be found to be ineffective. *Boyd v. State*, 289 Ga. App. 342, 656 S.E.2d 864 (2008), cert. denied, 2008 Ga. LEXIS 498 (Ga. 2008).

With regard to a defendant's conviction for armed robbery and other crimes, the defendant failed to establish ineffective assistance of counsel from failure to: (1) adequately prepare the defendant for trial; (2) keep the defendant adequately updated with respect to issues relevant to the defense; and (3) discuss post-trial motions; the defendant failed to meet the burden of proving that any such alleged deficiency prejudiced the defendant in any manner. Defense counsel's failure to file a written motion to sever would have been pointless, as the trial court had considered the defense's oral motion; there was no evidence in the record that other witnesses existed that could have been called on the defendant's behalf; and trial counsel did not represent the defendant with regard to the defendant's motion for a new trial, therefore, the alleged failure of trial counsel to prepare the defendant for the motion for new trial hearing could not have constituted ineffective assistance of counsel. *Grant v. State*, 289 Ga. App. 230, 656 S.E.2d 873 (2008).

A defendant failed to show that the defendant received ineffective assistance of counsel as a result of defense counsel failing to timely request funds for expert assistance so that the defendant could have a firearms expert testify on the defendant's behalf at trial as there was no reasonable probability that the outcome of the trial would have been different, even if defense counsel was deficient in failing to file a timely motion for funds for expert assistance. The defendant was unable to show that the trial court would have granted the motion even if it had been timely and there was no evidence in the record that the state's medical examiner and ballistics expert were biased or incompetent, and the state's case did not rest entirely on the experts' testimony, but rather was also established by the defen-

dant's own admissions. *Fincher v. State*, 289 Ga. App. 64, 656 S.E.2d 216 (2007).

Trial counsel was not ineffective for not using the word "pretextual" in making Batson challenges. Although counsel did not use the word "pretextual," counsel sought to rebut the prosecutor's explanations by arguing either that the strike was not race-neutral or that, considering the totality of the jury's responses to questions on voir dire examination, there was no factual basis for the strike. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

A defendant had not shown that trial counsel was ineffective for failing to give certain pretrial notices. The trial court had not excluded the evidence based on counsel's failure to comply with court rules; moreover, there was no prejudice because a witness had testified at trial as to the evidence the defendant claimed that counsel should have introduced. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

Defense counsel's failure to move for a directed verdict did not constitute ineffective assistance because the evidence presented was sufficient to sustain defendant's conviction for armed robbery; therefore, defendant was not entitled to a directed verdict and counsel's failure to move for the same did not entitle defendant to a new trial. The failure of counsel to pursue a meritless motion did not constitute ineffective assistance of trial counsel. *Range v. State*, 289 Ga. App. 727, 658 S.E.2d 245 (2008).

Trial counsel's delay in pursuing a defendant's motion for new trial after the defendant was convicted of felony murder did not result in a denial of the defendant's due process rights and did not constitute ineffective assistance as the record showed that much of the ten-year delay between the filing of the motion for new trial and the motion's resolution was due to the defendant's own inaction after counsel advised the defendant that counsel did not intend to pursue the motion for new trial or any other appellate process because counsel was unable to discern any error or merit to an appeal. *Browning v. State*, 283 Ga. 528, 661 S.E.2d 552 (2008).

Because defendant neither asked for

corrective action nor moved for a mistrial after the trial court's finding that a juror did not fall asleep, counsel was not ineffective because any objection or motion on the subject would have been unmeritorious. *Peterson v. State*, 294 Ga. App. 128, 668 S.E.2d 544 (2008).

While a juror initially stated during voir dire that the juror was unsure if the juror could be unbiased, but later stated the juror would try to be impartial and would follow the trial court's instructions, defense counsel was not ineffective for not moving to strike the juror for cause as such a motion would have been denied. *Brown v. State*, 293 Ga. App. 633, 667 S.E.2d 899 (2008).

Even assuming that defense counsel's failure to move for a mistrial following a comment by the State of Georgia was deficient, the defendant did not show ineffective assistance of counsel because the defendant did not show that a mistrial would have been granted had counsel done so. *Baker v. State*, 307 Ga. App. 884, 706 S.E.2d 214 (2011), cert. denied, No. S11C0940, 2011 Ga. LEXIS 517 (Ga. 2011).

Trial counsel was not ineffective for failing to move for a mistrial when a state's witness interjected bad character evidence because the witness's improper remarks were fleeting, unsolicited, and nonresponsive to the prosecutor's examination questions, and since the defendant did not show that the defendant was otherwise entitled to a mistrial based upon the circumstances, trial counsel's failure to pursue a meritless motion does not constitute ineffective assistance of counsel; the trial court sustained the objections to the improper testimony and instructed the prosecutor and witness to restrict the examination and responses, the witness and prosecutor complied with the trial court's instructions, and there was no further mention of the bad character evidence. *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

Trial counsel's failure to renew a non-meritorious motion for directed verdict provided no ground for claiming ineffective assistance of counsel. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

Defendant was not entitled to a new

trial, based upon ineffective assistance of counsel, because, even assuming that two jurors saw the defendant in shackles and handcuffs as the jurors returned from lunch, it could not have been presumed that the jury was unfairly tainted by the defendant's appearance as the evidence against the defendant was overwhelming. Furthermore, the defendant was not entitled to a new trial, based upon ineffective assistance of counsel, because there was no fatal variance between the indictment that alleged that the defendant committed armed robbery by use of a pellet pistol and evidence that showed that the weapon used was a BB gun. Because no fatal variance existed, the defendant's assertion that appellate counsel rendered ineffective assistance for failure to raise the issue on appeal also failed as the issue of variance was without merit. *Jones v. State*, 312 Ga. App. 15, 717 S.E.2d 526 (2011).

#### **Time with a client.**

Defendant failed to establish that trial counsel rendered ineffective assistance by failing to confer meaningfully with the defendant because the defendant did not specifically describe how additional communications with counsel could have changed the outcome of the trial; there exists no magic amount of time which counsel must spend in actual conference with a client. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

#### **Time to prepare for trial.**

Because the defendant was unable to establish prejudice resulting from trial counsel's alleged shortcomings, specifically that counsel was unprepared for trial, the defendant's ineffective assistance of counsel claim lacked merit. *Bradford v. State*, 287 Ga. App. 50, 651 S.E.2d 356 (2007).

Defendant did not meet the defendant's burden to demonstrate that counsel performed deficiently by failing to explain the risks of retaining new counsel on the eve of the defendant's trial as counsel testified that counsel interviewed all of the witnesses; met with the defendant the day before trial and for one or two hours on the morning of trial; and believed counsel had plenty of time to prepare for the misdemeanor trial. As the trial court was enti-

tled to credit counsel's testimony and disbelieve the defendant's, it was authorized to find that counsel was adequately prepared. *Bagley v. State*, 298 Ga. App. 513, 680 S.E.2d 565 (2009).

Defendant failed to show that counsel was ineffective due to counsel's alleged failure to adequately prepare the case and consult with the defendant prior to trial, although there were two public defenders that represented the defendant during the criminal proceedings, there was testimony from the second public defender that the case had been fully investigated and was ready to be tried, and that there was no reason to pursue further defenses. *Simmons v. State*, 309 Ga. App. 369, 710 S.E.2d 193 (2011).

Defendant did not show that trial counsel was unprepared for trial on the ground that counsel received thousands of pages of medical records shortly before trial because the defendant failed to establish that the receipt of the medical records shortly before trial was counsel's fault, and to the extent counsel's preparation was affected thereby, that preparation did not constitute deficient performance on counsel's part. *Eskew v. State*, 309 Ga. App. 44, 709 S.E.2d 893 (2011).

**Failure to prepare defendant adequately for trial.** — Defendant failed to show that defendant's trial counsel rendered ineffective assistance by failing to adequately prepare the defendant for trial because trial counsel testified that counsel met with the defendant at least four times prior to trial to discuss the case, and the defendant failed to demonstrate how additional time with counsel would have changed the outcome of defendant's case; trial counsel testified that counsel believed that counsel and the Spanish interpreters counsel used were able to effectively communicate with the defendant and that the defendant never gave counsel any indication that defendant was unable to understand Spanish. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Defendant, in the absence of a proffer showing how further preparation would have changed the defendant's testimony such that it would have affected the outcome of the case, could not meet the defendant's burden of making an affirmative

showing that specifically demonstrated how defense counsel's failure to have properly prepared the defendant for cross-examination would have affected the outcome of the defendant's case. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

**Duty of defense counsel to fully investigate case.**

Defendant's motion for a new trial was properly denied since defense counsel was not ineffective in: (1) failing to investigate the victim's reputation for violence and introduce evidence of that victim's prior violent acts; (2) failing to investigate the defendant's medical records; (3) failing to investigate a state witness's convictions for crimes of moral turpitude and request an impeachment charge concerning that witness; (4) advising defendant not to testify; and (5) failing to present evidence or argument at sentencing. *Cross v. State*, 285 Ga. App. 518, 646 S.E.2d 723 (2007), cert. denied, 2007 Ga. LEXIS 680 (Ga. 2007).

Defendant did not establish ineffective assistance of counsel based on failure to adequately investigate; although the defendant claimed that trial counsel failed to interview certain individuals, the defendant made no proffer of their expected testimony other than a general assertion that counsel would have discovered valuable information had counsel done so, and there was no showing that the evidence contained in certain records would have been relevant and favorable to the defendant. *Brooks v. State*, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

The trial court properly denied the defendant's motion for a new trial on appeal from the defendant's convictions of child molestation and aggravated child molestation because: (1) venue was adequately shown by the testimony of a single witness; (2) the defendant's trial counsel was not ineffective by failing to prepare for trial, investigate the case, subpoena important documents, interview key witnesses, and object to damaging testimony; and (3) the defendant failed to show that the outcome of the trial would have been different but for counsel's alleged shortcomings. *Brooks v. State*, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

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Defendant failed to establish that defendant received ineffective assistance of trial counsel with regard to defendant's drug-related convictions as, although defendant successfully met the burden of showing that defense counsel's representation fell below an objective standard of reasonableness due to defense counsel failing to advise defendant about all of the evidence in the state's case against defendant due to defense counsel failing to examine the state's open file, defendant failed to establish but for defense counsel's unprofessional errors, the result of the proceeding would have been different, namely that defendant would not have accepted the state's plea offer. *Cleveland v. State*, 290 Ga. App. 835, 660 S.E.2d 777 (2008).

As the defendant did not point to any exculpatory evidence or alibi a friend might have provided, the defendant did not establish that defense counsel was ineffective in failing to investigate the friend. *Wallace v. State*, 295 Ga. App. 452, 671 S.E.2d 911 (2009).

Defendant's assertion that defense counsel was ineffective for failing to investigate the lighting at an apartment complex failed as the defendant did not demonstrate what an investigation would have shown with respect to the sufficiency of the lighting and how the lighting might have affected the victim's ability to identify the defendant as the person who robbed the victim at gunpoint. *Killings v. State*, 296 Ga. App. 869, 676 S.E.2d 31 (2009).

Defendant, who was convicted of violat-

ing Georgia's Peeping Tom Statute, O.C.G.A. § 16-11-61, was entitled to a new trial since defendant's counsel failed to investigate the impact of defendant's multiple sclerosis, which might have been sufficient to create a reasonable doubt as to whether defendant acted with the purpose of spying on the victim. *Fedak v. State*, 304 Ga. App. 580, 696 S.E.2d 421 (2010).

Defendant failed to show that defendant's trial counsel rendered ineffective assistance by failing to hire an investigator and by failing to interview the victim, the police officers involved, and the fourth male at the scene because trial counsel testified that counsel spoke to several of the investigating officers about the case and to the victim's roommate, who initially contacted the police, and that counsel attempted to locate the fourth male at the scene but was told by the man's family members that the man had left the country; the defendant's argument concerning the alleged failures was foreclosed by defendant's failure to make any proffer of what the allegedly necessary investigations would have uncovered. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Trial counsel was not ineffective for failing to obtain and review the tape, transcript, and forensic report for an interview of the defendant's son and the victim's school and medical records because the defendant failed to demonstrate a reasonable probability that the outcome of the trial would have been different if defendant's counsel had obtained and reviewed the information; the differences between the son's first and second interview after a prolonged period of counseling were brought out in the trial, and the school records were unlikely to have had an impact on the outcome of trial. *Wade v. State*, 305 Ga. App. 382, 700 S.E.2d 827 (2010), cert. denied, U.S. , 131 S. Ct. 3066, 180 L. Ed. 2d 893 (2011).

Defendant failed to meet the defendant's burden of proving deficient performance on the ground that defendant's trial counsel failed to investigate an additional suspect because counsel testified that counsel investigated every person who could have been connected to the case and that counsel also investigated rele-

vant phone records and police files that could have revealed other suspects in the victim's murder; despite counsel's efforts, counsel was unable to connect any additional suspect to the shooting. *Jennings v. State*, 288 Ga. 120, 702 S.E.2d 151 (2010).

Defendant could show no harm due to trial counsel's failure to thoroughly investigate the facts of the case and to interview all potential witnesses because trial counsel testified that the victim and the victim's mother refused to speak to defense counsel, and the defendant did not identify any other witnesses or their potential testimony that should have been presented. *Neal v. State*, 308 Ga. App. 551, 707 S.E.2d 503 (2011).

Defendant failed to demonstrate that the defendant was deprived of effective assistance of counsel because the defendant could not show prejudice with regard to the defendant's assertions that counsel failed to fully investigate the case and call essential witnesses when the defendant made no proffer as to what a thorough investigation would have uncovered or what the essential witnesses would have said. *Ware v. State*, 307 Ga. App. 782, 706 S.E.2d 143 (2011).

Evidence supported a conclusion that the defendant failed to carry the burden of showing deficient performance or prejudice relating to counsel's preparation for trial because counsel testified that counsel and an investigator had interviewed numerous individuals in connection with the case; the defendant made no proffer as to what a more thorough investigation would have uncovered. *Jackson v. State*, 310 Ga. App. 476, 713 S.E.2d 679 (2011).

Trial court did not err when the court denied the defendant's ineffective assistance of counsel claim because counsel attempted to interview some of the state's witnesses, but some of the witnesses, including the state's main eyewitness, refused to speak to counsel. *Rafi v. State*, 289 Ga. 716, 715 S.E.2d 113 (2011).

Claim that counsel performed deficiently by failing to adequately prepare for trial and failing to investigate potential witnesses failed because two of the witnesses the defendant claimed should have been interviewed testified at trial and a third was interviewed but it was

determined that the third witness's testimony would not have established an alibi defense. *Griffin v. State*, 292 Ga. 321, 737 S.E.2d 682 (2013).

#### **Failure to research eyewitness identification.**

Defendant's trial counsel testified that counsel chose not to pursue evidence of an expert in eyewitness identification because counsel feared that doing so would have prompted the state to do the same, which counsel believed ultimately would have harmed the defense; trial counsel's tactical decision that the risks of introducing such expert evidence outweighed its potential benefits did not constitute deficient performance. *Breland v. State*, 287 Ga. App. 83, 651 S.E.2d 439 (2007), cert. denied, 2007 Ga. LEXIS 759 (Ga. 2007).

#### **Failure to call witness.**

On appeal from convictions on one count of aggravated sexual battery and two counts of sexual assault, the trial court did not err in denying the defendant's motion for a new trial as the defendant failed to show that any prejudice resulted from counsel's failure to call the defendant's wife to testify for the defense, and the appeals court refused to speculate that the wife's testimony would have led to an acquittal. *Lee v. State*, 286 Ga. App. 368, 650 S.E.2d 320 (2007).

Because the defendant was not denied the effective assistance of trial counsel based on the counsel's failure to call certain witnesses, as the testimony that these witnesses would have provided would not have affected the outcome of the trial, and counsel was not ineffective to the extent that the defendant was denied the right to testify at trial, the trial court properly denied the defendant a new trial. *Finch v. State*, 287 Ga. App. 319, 651 S.E.2d 478 (2007).

In a termination of parental rights matter, trial counsel was not ineffective, as the parent never informed counsel of any evidence or witnesses that would assist the parent's defense and never informed trial counsel or the parent's caseworker that the parent would not be attending the termination hearing. In the Interest of S.B., 287 Ga. App. 203, 651 S.E.2d 140 (2007).

The defendant's trial counsel was not

ineffective in failing to call a witness who would have testified that the victim fabricated claims of molestation, as: (1) the witness did not inform counsel of the witness before trial; (2) counsel articulated valid reasons for not calling the witness; (3) counsel challenged the state's evidence, arguing that the claims were fabricated; and (4) the defendant failed to show that any prejudice resulted from counsel's actions. *Noe v. State*, 287 Ga. App. 728, 652 S.E.2d 620 (2007).

Defendant did not show ineffective assistance when trial counsel used a third party's confession to challenge the thoroughness of the police investigation, but instead focused on challenging the voluntariness of the defendant's taped statement. The defendant did not show that this strategic decision was an unreasonable one or that the defense was prejudiced by counsel's decision not to call the third party based on counsel's assessment that the party lacked credibility. *Boseman v. State*, 283 Ga. 355, 659 S.E.2d 364 (2008).

In defendant's convictions for armed robbery, kidnapping, and aggravated assault in connection with robbery of a fast food restaurant, defendant failed to show that trial counsel was ineffective by failing to call three acquaintances as defense witnesses, as two of the witnesses had informed trial counsel that defendant had admitted to them that defendant was involved in the crimes; thus, defendant failed to show that trial counsel's strategy of not calling the witnesses (whose testimony would have been harmful) was patently unreasonable. *Holsey v. State*, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

With regard to a defendant's conviction for malice murder, the defendant failed to establish that the defendant was rendered ineffective assistance of trial counsel as a result of trial counsel failing to call certain additional witnesses since at the hearing on the defendant's motion for a new trial, trial counsel testified that various tactical reasons existed for not calling the various additional witnesses. *Ventura v. State*, 284 Ga. 215, 663 S.E.2d 149 (2008).

In an armed robbery prosecution, defense counsel was not deficient for not calling alleged alibi witnesses because

counsel interviewed the witnesses and deemed the witnesses unhelpful; and as defendant failed to produce the witnesses at the motion for a new trial, the defendant could not show prejudice or ineffective assistance. *Shabazz v. State*, 293 Ga. App. 560, 667 S.E.2d 414 (2008).

Defendant, who claimed that counsel was ineffective, did not show that the outcome of the trial would have been different if a certain eyewitness testified. Because the eyewitness stated that the eyewitness did not see who fired the shots in question, because other witnesses testified consistently with the eyewitness's pretrial statement that the defendant had been wrestled to the ground, and because those witnesses added that they saw the defendant fire a gun despite being wrestled to the ground, the defendant did not show that if the eyewitness had testified at trial, there was a reasonable probability that the result would have been different. *Savior v. State*, 284 Ga. 488, 668 S.E.2d 695 (2008).

If a witness claimed no knowledge of a statement and refused to testify about the statement at a motion for new trial hearing, it could not be assumed the witness would have testified differently or more fully at trial. Defendant failed to show that there was a reasonable probability that the result of defendant's trial would have been different, but for counsel's failure to produce the witness at trial. *Williams v. State*, 295 Ga. App. 249, 671 S.E.2d 268 (2008).

Defendant did not show prejudice from trial counsel's failure to call the defendant's future spouse and the future spouse's sibling as character witnesses. Even if counsel's decision could be considered unreasonable, the evidence supported a finding that both persons were biased toward the defendant; given this finding, the trial court was authorized to conclude that introduction of the character evidence likely would not have made a difference at trial. *Gresham v. State*, 295 Ga. App. 449, 671 S.E.2d 917 (2009).

Defendant's ineffective assistance of counsel claim lacked merit because while the defendant claimed that the defendant's love interest should have been called as a witness, the defendant did not

present the love interest's testimony at the hearing on the defendant's motion for new trial and, thus, the defendant could not demonstrate that any prejudice resulted from the love interest's absence at the trial. *Crawford v. State*, 297 Ga. App. 187, 676 S.E.2d 843 (2009).

Defendant, who admitted firing a gun to frighten four victims, argued that defense counsel was ineffective for not calling a witness who would have testified that the defendant had not pointed the gun at the victims. As the state, to convict the defendant of aggravated assault, was not required to show that the defendant pointed the gun at the victims, but only that the defendant placed the victims in reasonable apprehension of immediately receiving violent injuries, there was not a reasonable probability that, had counsel called this witness, the outcome of the trial would have been different. *Hudson v. State*, 296 Ga. App. 692, 675 S.E.2d 578 (2009).

There was no ineffectiveness of trial counsel in the defendant's criminal matter, as decisions regarding whether to cross-examine a witness or whether to call a witness were within counsel's trial strategy; further, since there was no showing that the outcome of the trial would have been different but for counsel's failure to object or to call a witness, there was no ineffectiveness shown. *Christian v. State*, 297 Ga. App. 596, 677 S.E.2d 767 (2009).

Defendant claimed that trial counsel was ineffective in failing to secure the presence of the defendant's father to testify at trial; however, the defendant did not call the father as a witness at the motion for new trial hearing, and without a proffer, was not able to show that trial counsel performed deficiently in not calling the father as a witness at trial. In any event, the evidence of the defendant's guilt was overwhelming, so no prejudice was shown. *Washington v. State*, 285 Ga. 541, 678 S.E.2d 900 (2009).

Although the defendant argued that the defendant received ineffective assistance of counsel because, inter alia, counsel failed to locate and call witnesses, the testimony of one of the witnesses was contradictory to the defense theory that the defendant was not at the scene of the

incident, and this strategy was reasonable; the defendant thus failed to establish the ineffective assistance of counsel claim. *Ransom v. State*, 298 Ga. App. 360, 680 S.E.2d 200 (2009).

Despite the absence of any physical evidence, the victims' testimonies were sufficient to find defendant guilty of aggravated child molestation and child molestation under O.C.G.A. § 16-6-4; counsel's strategic decisions in failing to call impeachment witnesses did not amount to deficient performance. *Barnes v. State*, 299 Ga. App. 253, 682 S.E.2d 359 (2009).

Trial counsel's performance was not constitutionally flawed because counsel could not be ineffective for failing to interview and call a potential alibi witness of whom counsel was not informed, and the trial court was authorized to credit counsel's testimony regarding the alibi witnesses whose names counsel was given; the defendant did not show that the testimony of the alibi witnesses would have been relevant and favorable because neither alleged alibi witness testified at the hearing on the motion for new trial. *McIlwain v. State*, 287 Ga. 115, 694 S.E.2d 657 (2010).

Defendant failed to demonstrate that defense counsel provided ineffective assistance because the defendant did not show that trial counsel's failure to further investigate and present testimony constituted deficient performance when the defendant neither identified any relevant witnesses nor put forward any evidence as to the testimony the witnesses would have given. *Smith v. State*, 303 Ga. App. 831, 695 S.E.2d 86 (2010).

Trial counsel's tactical decision that the defense would be better served if the victim did not take the witness stand was not deficient because the prosecutor explained in the prosecutor's opening that the state would not call the victim as a witness since the victim's injuries caused short-term memory loss, leaving the victim unable to recall what happened before, during, and after the relevant events, and trial counsel testified that the victim refused to talk to counsel's investigator prior to trial and that the counsel was pleased that the victim would not be a

witness since it was better to go to trial without a sympathetic victim; because the defendant did not call the victim as a witness at the motion for new trial hearing or present a legally acceptable substitute for the victim's testimony, it was impossible for the defendant to show prejudice resulting from the victim's absence at trial. *Taylor v. State*, 304 Ga. App. 395, 696 S.E.2d 686 (2010).

Defendant argued that defense counsel performed ineffectively by failing to investigate and learn prior to trial that the homeless victim would not be called by the state to testify. Defendant, however, has failed to show how this alleged deficiency by trial counsel prejudiced the defendant in any way. Thus, the defendant cannot prove that the alleged failure to investigate so prejudiced the defendant that there is a reasonable likelihood that, but for that deficiency, the outcome of the trial would have been different. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Defendant did not receive ineffective assistance of counsel when defendant's trial counsel failed to call additional witnesses because the defendant did not identify in the defendant's brief, nor did the defendant call to testify at the motion for new trial hearing, any witnesses who could have allegedly added the "material evidence" that the defendant claimed was missing from the defendant's defense. *Jennings v. State*, 288 Ga. 120, 702 S.E.2d 151 (2010).

Defendant did not show that defendant's trial counsel failed to exercise reasonable professional judgment in failing to secure the attendance of a witness because counsel had already announced ready for trial based on the defendant's assurance that no witness would come forward for the state, and the defendant did not inform counsel of the witness's existence until the eve of trial; counsel immediately proceeded to interview the witness but did not have sufficient time to procure and serve a subpoena before trial the next day, and the defendant could not demonstrate that the defendant's defense was prejudiced by counsel's failure to secure the witness's attendance at trial because the witness did not testify at the new trial hearing, and no substitute was

offered for the witness's testimony. *Presley v. State*, 307 Ga. App. 528, 705 S.E.2d 870 (2011).

Defendant failed to show that the defendant received ineffective assistance of counsel because the defendant did not show that the defendant was prejudiced by counsel's performance in that counsel did not call an alibi witness to testify at the hearing on the defendant's motion for new trial or provide a legally recognized substitute for the witness's testimony; the defendant made no affirmative showing that the purported deficiency in counsel's representation was indicative of ineffectiveness, as opposed to being an example of a conscious, deliberate, and reasonable trial strategy. *Newsome v. State*, 288 Ga. 647, 706 S.E.2d 436 (2011).

Defendant failed to demonstrate that trial counsel rendered ineffective assistance by failing to call additional witnesses because the defendant failed to overcome the strong presumption that counsel's tactical decision to forego putting the subject witnesses on the stand was within the broad range of reasonable professional conduct; trial counsel testified that counsel decided not to present the other witnesses because counsel thought that the other witnesses would not "stand up well to cross-examination," that the jury would perceive variances in the testimony, that counsel was worried about credibility issues, and that counsel thought the defendant's "best chance" at establishing an alibi was with "one good clean witness." *Smiley v. State*, 288 Ga. 635, 706 S.E.2d 425 (2011).

Trial counsel was not ineffective in failing to confront the victim at trial when counsel testified that counsel did not call the victim to the stand because counsel thought that the victim's testimony would have done more damage than help; the mere existence of a defendant's right to confront a witness at trial cannot be taken to mean that it is always in the defendant's interest to do so. *Robinson v. State*, 308 Ga. App. 45, 706 S.E.2d 577 (2011).

Ineffective assistance of counsel was not shown because a juvenile failed to make an affirmative showing that specifically demonstrated how counsel's failure to investigate and present testimony from an

investigator and the victim's friend would have affected the outcome of the juvenile's case. To the extent that the juvenile relied upon trial counsel's testimony to establish the investigator's and the friend's expected statements and to prove that the trial counsel's performance was deficient for failing to explore their testimony, such evidence was hearsay and had no probative value. In the Interest of D.M., 308 Ga. App. 589, 708 S.E.2d 550 (2011).

Trial counsel was not ineffective for failing to locate and call witnesses who purportedly would have corroborated the defendant's claim that the defendant had a prior, consensual sexual relationship with the victim because the defendant failed to show that the purported deficiency of the defendant's trial counsel prejudiced the defendant's defense, given that the defendant failed to proffer the testimony of any of the alleged potential witnesses at the hearing on the motion for a new trial; because the defendant failed to make such a proffer, it was impossible for the defendant to show that there was a reasonable probability the results of the proceeding would have been different and thus impossible for the defendant to succeed on the ineffective assistance claim. *Alvarez v. State*, 309 Ga. App. 462, 710 S.E.2d 583 (2011).

Trial counsel was not ineffective for failing to call a witness to rebut similar transaction evidence at defendant's trial because the purported testimony of the witness was questionable, and trial counsel's tactical decision not to call the witness was not unreasonable. *Espinosa v. State*, 309 Ga. App. 877, 711 S.E.2d 425 (2011).

Trial court did not err when the court denied the defendant's ineffective assistance of counsel claim because, although counsel did not present all three witnesses identified by the defendant as corroborating the defendant's claim of self-defense, counsel did present one witness who established the defendant's claim. *Rafi v. State*, 289 Ga. 716, 715 S.E.2d 113 (2011).

Trial counsel was not ineffective for failing to call the codefendant as a witness because the codefendant was not a consistent witness. *Simmons v. State*, 289 Ga. 773, 716 S.E.2d 165 (2011).

Because the defendant made no showing that trial counsel's failure to call the defendant or the defendant's mother as a witness was indicative of ineffectiveness as opposed to a deliberate and reasonable trial strategy, the trial court was authorized to conclude that the defendant had not carried the defendant's burden of proving ineffective assistance of counsel; the defendant failed to overcome the strong presumption that counsel's tactical decision not to call the defendant's mother fell within the broad range of professional conduct, and the defendant failed to show how the witness' testimony would have changed the outcome of the trial when the same evidence the defendant contended the mother would have testified to was admitted through other witnesses. *Gibson v. State*, 290 Ga. 6, 717 S.E.2d 447 (2011).

Trial counsel was not ineffective for failing to depose the defendant's father, a potential alibi-type witness who died prior to trial, as counsel's decision was a reasonable strategy since portions of the father's testimony would not have been beneficial to the defense. *Chalk v. State*, 318 Ga. App. 45, 733 S.E.2d 351 (2012).

**Failure to challenge competency of witness.** — Defense counsel was not ineffective for failing to challenge the competency of child witnesses because both victims were asked to demonstrate their understanding of the difference between the truth and a lie and both stated that they would tell the truth; the defendant gave no basis upon which, had defense counsel challenged their competency, the trial court would have ruled the children incompetent to testify, and defense counsel was not required to make a meritless objection. *Vaughn v. State*, 307 Ga. App. 754, 706 S.E.2d 137 (2011).

**Failure to object to cross-examination of defendant.** — In a prosecution for the murder of the defendant's romantic companion, defense counsel was not ineffective for failing to object to cross-examination of the defendant about "the cycle of violence" that occurred in some domestic relationships. As there was evidence that the defendant assaulted the victim in the past, the question was proper and an objection would have been meritless. *Watkins v. State*, 285 Ga. 355, 676 S.E.2d 196 (2009).

Trial counsel was not ineffective for failing to object to the state's cross-examination of the defendant because the state's questioning was similar to that which the trial court had already permitted, primarily eliciting specifics regarding the occasions when the defendant spoke to investigating officers, and counsel's strategic decision not to highlight such cumulative information was a legitimate trial strategy that fell within the range of reasonable professional conduct. *Kendrick v. State*, 287 Ga. 676, 699 S.E.2d 302 (2010).

Defense counsel was not ineffective for failing to make an objection regarding the prosecutor's questions on cross-examination because the prosecutor's questions exploring any inconsistencies or omissions concerning the statements that the defendant voluntarily made to the police were proper and the defense counsel was not required to make an objection that lacked merit. *Gilyard v. State*, 288 Ga. 800, 708 S.E.2d 329 (2011).

Because the prosecutor's question to the defendant on cross-examination was unlikely to be interpreted as a comment on the defendant's silence, the failure of the defendant's trial counsel to object to the question did not constitute deficient performance; the prosecutor's question did not imply that the defendant should have spoken to police officers or other government agents between the arrest and the trial, and, because the defendant did testify at trial, the question could not be construed as a comment on the defendant's failure to testify at trial. *Willis v. State*, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Defendant could not show that trial counsel performed deficiently by failing to object to the prosecutor's alleged "testimony" because the record did not support the defendant's assertion that the prosecutor, in posing leading questions to the defendant during cross-examination, "testified" against the defendant. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

#### **Examination of witnesses.**

A defendant had not shown that counsel was ineffective for not seeking to strike certain eyewitness testimony: it was clear that the eyewitness's statement that the

victim had died because the defendant stabbed the victim in the chest was not expert testimony, and any error was nonprejudicial in light of the overwhelming evidence that the defendant inflicted the stab wound to the victim's chest and the uncontradicted evidence that the victim died as the result of that wound. *Stanley v. State*, 283 Ga. 36, 656 S.E.2d 806 (2008).

A defendant had not shown that counsel was ineffective for putting a witness's pre-trial statement into evidence: counsel testified that the statement was put into evidence so that the jury could see the inconsistencies between it and the witness's testimony in court, and the portion of the statement describing the defendant as the individual who stabbed the victim in the chest merely echoed the witness's trial testimony. *Stanley v. State*, 283 Ga. 36, 656 S.E.2d 806 (2008).

Because defense counsel obtained testimony from a codefendant that the codefendant had substantial motivation to testify against the defendant, counsel's failure to ask about specific effects of the codefendant's plea deal was not patently unreasonable. Moreover, given the overwhelming evidence of the defendant's guilt, it was unlikely that additional impeachment of the codefendant would have changed the outcome of the trial. *Daugherty v. State*, 291 Ga. App. 541, 662 S.E.2d 318 (2008), cert. denied, 2008 Ga. LEXIS 792 (Ga. 2008).

Given the lack of evidence of a deal between an accomplice witness and the state, trial counsel was not deficient in failing to cross-examine the witness about whether a deal existed; furthermore, counsel's representation did not fall outside of the broad range of reasonable professional conduct because counsel did not ask the witness whether the witness had a hope of benefitting from the witness's testimony. Even assuming *arguendo* that trial counsel was deficient in failing to cross-examine the witness about whether the witness held any hope of benefit, the defendant did not shown prejudice; the statement the witness initially gave to the police was consistent in material respects with the witness's trial testimony, and both statements were also corroborative of

the victim's trial testimony. *Varner v. State*, 297 Ga. App. 799, 678 S.E.2d 515 (2009).

Trial court did not err in concluding that a defendant failed to show that the defendant had received ineffective assistance of counsel on the ground that counsel failed to obtain testimony from one of the state's witnesses because although the defendant claimed on appeal that the witness's testimony would have supported the defendant's defense that the victims were coconspirators, the evidence showed that the defendant did not inform trial counsel that the witness had any information regarding the defendant's prior knowledge of the victims; even if the defendant had made trial counsel aware of such knowledge, the witness's vague recollection was unlikely to have changed the outcome of the case. *Brown v. State*, 299 Ga. App. 782, 683 S.E.2d 874 (2009).

Defendant's trial counsel was not ineffective for failing to object when the trial court stopped defense counsel's cross-examination regarding an accomplice's drug involvement because even if trial counsel could have properly objected to the trial court's action, the defendant failed to show any harm by defendant's trial counsel's failure to do so, and trial counsel effectively impeached the accomplice by getting the accomplice to admit to another crime, and any further questioning regarding drug involvement would merely have been cumulative; the defendant did not call the accomplice to testify at the hearing on defendant's motion for new trial, and speculation as to what the accomplice's testimony would have been did not satisfy the defendant's burden to show that the result of defendant's trial would have been different if trial counsel had objected to the trial court's action and had trial counsel continued to cross-examine the accomplice regarding the drug issue. *Smith v. State*, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

Trial court did not err in finding that trial counsel was not ineffective for failing to object to a witness's unsolicited mention of the defendant's prior bad acts because any objection would have been fruitless; the defendant could not show that the defendant was harmed by the witness's

answer because trial counsel followed up with a question regarding the defendant's criminal history, and the police chief acknowledged that the defendant had never been convicted of a felony. *Smith v. State*, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

Trial counsel was not ineffective by eliciting testimony from a narcotics investigator on cross-examination that a confidential informant told the investigator that the informant had bought drugs from the defendant in the past because trial counsel's testimony provided some evidence that counsel's decision about what questions to ask on cross-examination of the investigator was a matter of reasonable trial strategy, and the defendant failed to rebut the presumption that the strategy was reasonable; trial counsel testified that counsel's trial strategy had been to show that because the investigator continued to rely upon the informant in other cases, the investigator had an incentive to exaggerate or lie about the informant's prior dealings with the defendant. *Martinez v. State*, 303 Ga. App. 166, 692 S.E.2d 766 (2010).

Trial counsel was not ineffective for failing to object to a witness's reference to marijuana because any challenge to the testimony would have failed; even if the testimony incidentally placed the defendant's character in issue, all circumstances with an accused's arrest were admissible if the circumstances were shown to be relevant, and that was so even if the evidence incidentally put the accused's character in issue. *Odum v. State*, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010).

Trial counsel did not render ineffective assistance by failing to interview witnesses who could have corroborated the defendant's claim that defendant's encounter with a victim was consensual because the defendant's claim that the two alleged witnesses could corroborate the defendant's defense was not supported by the record; counsel testified that counsel tracked down the female friend who the defendant claimed had given the defendant a ride to the victim's house on the night of the attack and that the friend denied doing so, and counsel testified that

counsel attempted to locate the drug dealer who the defendant claimed could corroborate that the defendant and the victim knew each other but that counsel was unable to do so because the defendant only gave counsel the dealer's first name and the name of the apartment complex where the defendant believed the drug dealer lived. *Mattox v. State*, 305 Ga. App. 600, 699 S.E.2d 887 (2010).

Defendant did not show that defendant's trial counsel rendered ineffective assistance for failing to procure a witness in support of an alibi defense because trial counsel testified that counsel did not attempt to find the witness since, among other reasons, the defendant did not provide counsel with a last name for the witness; the defendant did not produce any evidence to show that a competent attorney exercising reasonable diligence under the same circumstances would have been able to locate the witness, and no evidence was presented as to what testimony the witness would have given at trial. *Miller v. State*, 305 Ga. App. 620, 700 S.E.2d 617 (2010).

Defendant juvenile did not receive ineffective assistance of trial counsel because the defendant did not demonstrate a reasonable probability that the outcome of the defendant's case would have been different if defendant's trial counsel had cross-examined the victim about whether the defendant's use of alcohol affected the defendant's memory of the events; during the defendant's testimony, the defendant admitted that the defendant followed the victim off a train and struck the victim. In the Interest of J. W., 306 Ga. App. 339, 702 S.E.2d 649 (2010).

Codefendant's trial counsel was not ineffective in failing to object to testimony from one of the victims and a police officer regarding the codefendant's prior purchase of marijuana from one of the victims because drug use showed the codefendant's motive to rob a home where he believed illegal drugs and money would be found; an accomplice testified that the motive for the robbery was that the victims kept drugs and cash in the apartment and that the codefendant planned the robbery and knew that drugs and money were kept in the house. *Wilson v.*

*State*, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Defendant's trial counsel was not ineffective in failing to object to a question directed to an accomplice because counsel himself opened the line of questioning on cross-examination, and in the absence of his testimony, it was presumed to be a strategic decision; having made that decision, trial counsel could not object, and because trial counsel succeeded in obtaining acquittal on the three most serious charges against the defendant that strongly supported the conclusion that the assistance actually rendered by trial counsel fell within that broad range of reasonably effective assistance that members of the bar in good standing were presumed to render. *Wilson v. State*, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Defendant failed to show that the outcome of the trial would have been different had counsel questioned the phlebotomist who drew the defendant's blood about the fact that the phlebotomist did not invert the blood tubes and introduced evidence regarding the impact of that omission on the blood test results because there was no evidence that the phlebotomist failed to invert the tubes; the phlebotomist did not testify that the phlebotomist failed to invert the tubes. *Fletcher v. State*, 307 Ga. App. 131, 704 S.E.2d 222 (2010).

Defendant failed to demonstrate that trial counsel rendered ineffective assistance by mistakenly referring to the night of the murder as August 30 rather than September 1, 2006, during the direct examination of the host of a barbecue because the transcript of defense counsel's complete questioning of the host and the host's responsive testimony made clear that both were operating under the premise that the event of the barbecue took place on the day of the murder, which was unquestionably September 1, 2006, and thus, the jury was aware that the host was testifying in an attempt to establish an alibi for the defendant; there was not a reasonable probability that, but for counsel's mistake, the outcome of the defendant's trial would have been different because it was plain that the host was testifying about the night of the murder,

and the host's testimony fell well short of establishing an alibi for the defendant for other reasons. *Smiley v. State*, 288 Ga. 635, 706 S.E.2d 425 (2011).

Trial counsel's performance was not deficient when counsel elicited testimony from a detective that another witness, besides the victim, had identified the defendant as being at the scene of the crimes because the discussion between the trial court and defense counsel indicated that defense counsel had done extensive discovery in the case and was surprised by the detective's answer; even if counsel was ineffective, the error did not so undermine the proper functioning of the adversarial process that the trial court could not have reliably produced a just result. *Delgiudice v. State*, 308 Ga. App. 397, 707 S.E.2d 603 (2011).

Trial counsel's failure to cross-examine the codefendant about a plea deal was not patently unreasonable because trial counsel's decision not to question the codefendant due to the potential harm to the defendant was a tactical and strategic decision; even if trial counsel performed deficiently, the defendant could not show prejudice in light of the overwhelming evidence against the defendant, and even in the absence of the defendant's testimony placing the defendant at the scene and acknowledging that the defendant hit the victim, under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the victim's testimony alone was sufficient to establish the facts necessary to support the defendant's convictions. *Bonner v. State*, 308 Ga. App. 827, 709 S.E.2d 358 (2011).

Trial counsel was not ineffective for failing to object when the lead investigator was allowed to "interpret" the recordings of inmate phone calls by explaining the meaning of certain words and phrases because the investigator's qualifications as a narcotics investigator were established by the investigator's testimony at trial, and the investigator made it clear that the investigator was explaining the meaning of certain slang terms used during the conversations based on the investigator's experience with drug investigations. *Lowe v. State*, 310 Ga. App. 242, 712 S.E.2d 633 (2011).

Trial counsel was not ineffective in failing to prepare to cross examine a ballistics expert the state called because counsel testified that counsel had reviewed the ballistics evidence; therefore, counsel was prepared to question a ballistics expert, regardless of the expert's identity and did indeed cross-examine the expert the state called. *Funes v. State*, 289 Ga. 793, 716 S.E.2d 183 (2011).

Defense counsel was not ineffective in asking the codefendant's father if the father told the defendant to hide a gun because defense counsel testified that the testimony was used to shift responsibility to the codefendant; counsel's examination of the father was cumulative of prior testimony elicited by the prosecutor. *Chance v. State*, 291 Ga. 241, 728 S.E.2d 635 (2012).

Trial counsel was not ineffective for failing to interview witnesses because the defendant did not proffer any specific evidence tending to show that the defendant suffered prejudice as a result of the omissions; the defendant failed to assert or show how any of the potential evidence would have affected the defendant's conviction. *Coney v. State*, 316 Ga. App. 303, 728 S.E.2d 899 (2012).

Trial counsel was not ineffective for failing to ask about specific effects of a plea deal when counsel obtained testimony that an accomplice had motivation to testify against the defendant. *Holder v. State*, 319 Ga. App. 239, 736 S.E.2d 449 (2012).

#### **Failure to impeach witness.**

Because: (1) the defendant failed to show that counsel was deficient in failing to impeach a cohort in the crimes charged with a prior felony conviction; (2) counsel made the strategic decision to restrict the scope of the cohort's cross-examination; and (3) the defendant could not show any prejudice resulting from counsel's actions, the defendant's ineffective assistance of counsel claim lacked merit. *Jones v. State*, 289 Ga. App. 219, 656 S.E.2d 556 (2008), cert. denied, 2008 Ga. LEXIS 381 (Ga. 2008).

Defense counsel was not ineffective for failing to object to the trial court's exclusion of a state witness's conviction without conducting the balancing test required by

former O.C.G.A. § 24-9-84.1(a)(1) (see now O.C.G.A. § 24-6-609) because the defendant made no showing that the prior conviction would have been admitted notwithstanding the stringent limitations in former § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609) on the use of a conviction more than ten years old. *Chance v. State*, 291 Ga. 241, 728 S.E.2d 635 (2012).

Because the defendant failed to show that any prejudice resulted from trial counsel's alleged ineffectiveness in failing to discover and introduce the criminal record of one of the witnesses for the prosecution for impeachment purposes, the defendant's convictions were upheld on appeal. *Rivers v. State*, 283 Ga. 108, 657 S.E.2d 210 (2008).

With regard to defendant's conviction for arson and other related crimes, defendant failed to establish that defense counsel rendered ineffective assistance by failing to impeach a witness with evidence that the witness previously had committed arson as instances of specific misconduct cannot be used to impeach a witness's character or veracity unless the misconduct resulted in the conviction of a crime involving moral turpitude, and the proper method of proving such a conviction was by the introduction of a certified copy of the conviction. Since no conviction existed, defense counsel could not be charged with deficient performance in failing to attempt to introduce inadmissible evidence. *Shelnutt v. State*, 289 Ga. App. 528, 657 S.E.2d 611 (2008), cert. denied, No. S08C0977, 2008 Ga. LEXIS 518 (Ga. 2008).

Because: (1) trial counsel could not be deemed ineffective in failing to move to strike two jurors who were allegedly convicted felons, as their felon status had not been proven; (2) defendant failed to show that counsel was ineffective in failing to adequately impeach a detective concerning a previous suspension; and (3) order denying suppression was supported by probable cause, defendant's ineffective assistance of counsel claims lacked merit. *Jones v. State*, 289 Ga. App. 767, 658 S.E.2d 386 (2008).

With regard to defendant's convictions for malice murder and other crimes, defendant failed to show that defense coun-

sel was ineffective for failing to impeach four witnesses' testimony by the witnesses' convictions as such impeachment would have caused defense counsel to lose the right to make the final closing argument under O.C.G.A. § 17-8-71. *Adams v. State*, 283 Ga. 298, 658 S.E.2d 627 (2008).

Defendant's passenger testified that the defendant stole a purse from a vehicle in a parking lot; defense counsel was not deficient for not introducing evidence of the passenger's criminal conviction. Counsel questioned the passenger as to the fact that the passenger was arrested along with the defendant for a probation violation, and that the passenger was found in possession of other persons' credit cards; as the jury was made aware that the passenger had a criminal record, the defendant did not show that but for counsel's failure to formally introduce the passenger's conviction, the outcome of the trial would likely have been different. *Dennis v. State*, 294 Ga. App. 171, 669 S.E.2d 187 (2008).

There was no ineffectiveness by the defendant's counsel in failing to obtain a continuance in the defendant's criminal trial in order to more effectively impeach a witness for the state with certified copies of all of the witness's prior convictions, as counsel had impeached the witness with a number of convictions and there was no reasonable probability that the additional ones would have changed the outcome of the trial; further, the failure to cross-examine that witness regarding the initial denial of a criminal history was not ineffectiveness, as it would not have changed the outcome and it was not necessarily even admissible impeachment evidence. *Johnson v. State*, 297 Ga. App. 823, 678 S.E.2d 531 (2009).

Trial court did not err in finding that ineffective assistance of counsel had not been proven when trial counsel failed to impeach a witness with evidence of charges pending against the witness because the defendant failed to establish that the outcome of the defendant's trial would have been different had the witness been impeached; there were eyewitness identifications of defendant as the shooter, evidence that the defendant had been looking for the victim and believed the

victim had robbed the defendant, and evidence that the defendant had been shot. *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

Trial counsel was not ineffective for failing to focus the jury's attention on the fact that a passenger was not being prosecuted for any involvement in the theft of the defendant's automobile or for originally telling the investigating officers that the passenger did not know that a driver would steal the automobile because the jury had already been informed that the passenger had multiple felony convictions and was a close friend of the driver; the defendant failed to establish that had counsel additionally impeached the passenger, there was a reasonable probability that the result of the trial would have been different. *Kendrick v. State*, 287 Ga. 676, 699 S.E.2d 302 (2010).

Defendant failed to establish that the defendant received ineffective assistance of trial counsel due to counsel's failure to provide the state with written notice of the defendant's intent to use evidence of a witness's prior conviction for impeachment purposes pursuant to former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609) because even if the conviction had been admitted and the jury had disregarded the witness's testimony, there remained evidence sufficient to convict the defendant; the witness's trial testimony conflicted with the witness's prior statements, and the witness admitted on the stand being a crack dealer. *Lanier v. State*, 288 Ga. 109, 702 S.E.2d 141 (2010).

Defendant did not show a reasonable probability that the trial would have ended differently if trial counsel had uncovered all the details about the victim's first offender plea and cross-examined the victim about the victim's possible bias toward the state because five witnesses separately testified that the defendant assaulted the victims with a gun; thus, even if the jury decided to completely disregard the victim's testimony based on successful cross-examination, the testimony of four other eyewitnesses remained. *Strong v. State*, 308 Ga. App. 558, 707 S.E.2d 914 (2011).

Trial court's conclusion that trial counsel's failure to obtain certified copies of the

victim's prior felony convictions and first offender plea, which the defendant asserted would have been admissible to impeach the victim and show bias under former O.C.G.A. § 24-9-84.1 (see now O.C.G.A. § 24-6-609), did not constitute ineffective assistance and was not clearly erroneous because counsel made a strategic decision not to expend the limited resources of the office to obtain the certified copies, choosing instead to focus on other avenues of defense. *Strong v. State*, 308 Ga. App. 558, 707 S.E.2d 914 (2011).

Trial counsel was not ineffective for failing to highlight the inconsistencies between a prior victim's trial testimony and the victim's account of a shooting as reported to police immediately after the victim was shot because although trial counsel testified that counsel recalled that the account in the police report was inconsistent with the victim's trial testimony, appellate counsel never inquired as to why trial counsel chose not to use the police report to impeach the state's pre-trial proffer or the victim's trial testimony; in the absence of any evidence on the issue, it was presumed that trial counsel made a reasonable strategic decision not to pursue that mode of impeachment. *Johnson v. State*, 289 Ga. 22, 709 S.E.2d 217 (2011).

Defendant's trial counsel was not ineffective for failing to discredit the veracity of an inmate witness who testified to the defendant's jailhouse confession because at trial the inmate witness appeared in prison clothes, and the state elicited testimony from the inmate that the inmate was a convicted felon; since the evidence was properly before the jury, it could not be shown that the omission was an unreasonable tactical move that no competent attorney in the same situation would have made. *Brown v. State*, 289 Ga. 259, 710 S.E.2d 751 (2011), cert. denied, U.S. , 132 S. Ct. 524, 181 L. Ed. 2d 368 (2011).

Defendant failed to establish that trial counsel rendered ineffective assistance because although the defendant contended that trial counsel should have impeached a witness with testimony from a pre-trial hearing, and the defendant failed to establish that there was any reasonable

probability that had counsel pursued the line of questioning, the outcome of the trial would have been different; at the pre-trial hearing, the witness was testifying regarding the behavior of prostitutes, not about what another person recounted to the witness. *White v. State*, 289 Ga. 511, 712 S.E.2d 834 (2011).

Trial counsel was not ineffective for failing to impeach a witness through the use of prior inconsistent statements because, on cross-examination, counsel did attempt to impeach the witness with comments in the witness's statement to the police, the video recording of the witness's statement was admitted at trial, and the defendant did not establish that trial counsel's tactics for laying a foundation for impeaching the witness in regard to the statement was unreasonable. *Nations v. State*, 290 Ga. 39, 717 S.E.2d 634 (2011).

Although trial counsel's performance was defective for failing to urge that counsel was entitled to cross-examine the defendant's cell mate about probation revocation charges that were pending at the time the cell mate went to the police with the defendant's jailhouse confession, the defendant failed to show that there was a reasonable probability that the outcome of the trial would have been different if counsel's performance had not been deficient because the victim testified about the struggle with the defendant, DNA evidence placed the defendant in the apartment, and the defendant was hospitalized for a gunshot wound consistent with the victim's testimony. *Davis v. State*, 312 Ga. App. 328, 718 S.E.2d 559 (2011).

Trial counsel did not fail to adequately question and impeach the state's witness because counsel did not question the witness about potential deals, favorable treatment, or why the witness was handcuffed since the witness was arrested on a material witness warrant and had no pending cases about which to make a deal; the defendant could not show prejudice because the state had already elicited from the witness information about prior drug convictions and that the witness was jailed the preceding day for failing to appear to testify in the defendant's case. *Johnson v. State*, 290 Ga. 382, 721 S.E.2d 851 (2012).

**Failure to object to hearsay testimony of witness.** — As a parent's testimony about a child's claim of being molested by the defendant was not admissible under the former Georgia Child Hearsay Statute, O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), because the child was 15 when the accusation was made, defense counsel was ineffective in failing to object at trial. *Cash v. State*, 294 Ga. App. 741, 669 S.E.2d 731 (2008).

Because defendant's counsel had no reasonable strategic reason for not objecting to a detective's hearsay testimony regarding an accomplice's custodial statement identifying defendant as a purse snatcher, the outcome of the trial might have been different; therefore, the trial court erred in denying defendant's motion for new trial. *Grindle v. State*, 299 Ga. App. 412, 683 S.E.2d 72 (2009).

Trial counsel was ineffective because counsel did not properly object to evidence that the defendant was a drug trafficker who always carried a gun, that the defendant was a dangerous man, that the defendant was the shooter in a similar transaction, and that the defendant's other girlfriend knew where the gun was located after the second crime; the statements, especially that the defendant's other girlfriend knew where the gun was located, were clearly objectionable hearsay, and failing to object to that statement alone was deficient because the statement linked the defendant to the principal crime. *Ward v. State*, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

Trial counsel was not ineffective for failing to object to the responding officer's testimony about what the victim said at the time of the incident because the testimony at issue was admissible as part of the *res gestae* of the crime. *Mubarak v. State*, 305 Ga. App. 419, 699 S.E.2d 788 (2010).

Trial court did not err in denying the defendant's motion for new trial on the basis of ineffective assistance of counsel because the defendant failed to rebut the presumption that trial counsel performed within the wide range of reasonable professional assistance in failing to challenge hearsay testimony; requesting a curative

instruction, after a successful objection by co-counsel, could have called more attention to the remark, and a remark implicating two African-Americans fit in with the defendant's trial strategy to implicate the two codefendants. *Jackson v. State*, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Trial counsel did not provide ineffective assistance by failing to object to the arresting detective's testimony about what a witness told the defendant just prior to a shooting because although the testimony was inadmissible hearsay since the state failed to lay a proper foundation for the admission of a prior inconsistent statement by not asking the witness about the witness's statement, the defendant failed to show a reasonable probability that the outcome of the trial would have been different if counsel had objected to the testimony; four eyewitnesses other than the witness testified that those witnesses saw the defendant shoot the victim, and the witnesses independently picked the defendant out of a photographic lineup. *Cannon v. State*, 288 Ga. 225, 702 S.E.2d 845 (2010).

Trial counsel was not ineffective for failing to object to a lead investigator's references to a tip the investigator received from an unnamed source implicating the defendant in a shooting because counsel did object to at least one of the investigator's references to the tip and to two questions bearing the potential to elicit responses regarding the substance of the tip; because none of the investigator's references to the tip constituted reversible error, any failure of counsel to object in certain of those instances could not give rise to an ineffectiveness claim. *Johnson v. State*, 289 Ga. 22, 709 S.E.2d 217 (2011).

Defendant did not receive ineffective assistance of counsel due to trial counsel's failure to object when a witness testified as to statements a man made because the testimony was hearsay but nevertheless admissible as part of the *res gestae* of the crime and, thus, trial counsel was not deficient for failing to object to admissible evidence; the defendant's right to confrontation was not compromised because the statements to the witness was not testimonial. *Kitchens v. State*, 289 Ga. 242, 710 S.E.2d 551 (2011).

Defendant could not establish that the trial court's admission of a witness's testimony would have constituted an abuse of discretion had trial counsel voiced an objection because the evidence was admissible under the necessity exception to the hearsay rule, subject to the trial court's discretion. *White v. State*, 289 Ga. 511, 712 S.E.2d 834 (2011).

Trial counsel was not ineffective for failing to raise a hearsay objection to testimony about surveillance videotape because such an objection would have been unavailing; the surveillance footage and the testimony about what the witnesses personally observed on the videotape was not hearsay. *Hammock v. State*, 311 Ga. App. 344, 715 S.E.2d 709 (2011).

Defendants' trial counsel was not ineffective for having failed to object on hearsay grounds to an investigator's testimony regarding the reasons why the victim's sibling and the sibling's spouse could not come to court to testify because the defendant suffered no harm from the admission of the testimony as the testimony had nothing to do with either the charged offenses or with the defendant as the alleged perpetrator of the alleged crimes. *Adel v. State*, 290 Ga. 690, 723 S.E.2d 666 (2012).

Trial counsel was not ineffective for failing to object on hearsay grounds to portions of a Secret Service agent's testimony about what the agent learned during the investigation since the agent did not repeat the testimony of an out-of-court declarant and was not hearsay. *Bearden v. State*, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

Trial counsel was not ineffective for failing to make a hearsay objection to the investigating officer's testimony concerning statements that a witness and the victim's mother made to the officer recounting the allegations of the victim because counsel's trial strategy was to highlight the inconsistencies between what the witness and the mother said the victim told them and what the victim subsequently told the forensic interviewer. *Henry v. State*, 316 Ga. App. 132, 729 S.E.2d 429 (2012).

Trial counsel was not ineffective for failing to object to the trial court's deter-

mination that the victim was present and available to testify without further inquiring into the reliability of the victim's out-of-court statements under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) because counsel did not want the statements to be excluded in light of counsel's trial strategy to show that the victim had been coached. *Henry v. State*, 316 Ga. App. 132, 729 S.E.2d 429 (2012).

**Failure to move for mistrial on basis of witness's testimony.** — Defendant failed to establish a claim of ineffective assistance of counsel due to counsel's failure to seek a mistrial after successfully objecting to a witness's testimony that the defendant told the witness that "he would have a shoot-out with police before he ever went back to jail" on the ground that the witness's response placed the defendant's character in evidence because even if counsel's failure to request a mistrial were deemed deficient, no mistrial would have been granted as a nonresponsive answer that impacted negatively on a defendant's character did not improperly place the defendant's character in issue. *Billings v. State*, 308 Ga. App. 248, 707 S.E.2d 177 (2011).

**Failure to obtain medical evidence.** — In a prosecution for felony obstruction of an officer, the defendant's claim that counsel was ineffective for failing to subpoena the defendant's medical records to show injuries received in the struggle with police failed as the defendant did not state what these medical records would have shown or how this would have changed the outcome of the trial. *Steillman v. State*, 295 Ga. App. 778, 673 S.E.2d 286 (2009).

Defendant did not carry the defendant's burden of showing that trial counsel was deficient for failing to preserve a sample of the defendant's blood for later testing to determine whether the defendant's mind was impaired during the interrogation session because the defendant did not cite to anything in the record that showed that the state obtained a blood sample from the defendant; counsel testified that counsel investigated whether such a blood sample existed but found no evidence of the sample, and one could not fault counsel for failing to secure and to maintain a blood

sample for testing if the sample did not exist. *Hester v. State*, 304 Ga. App. 441, 696 S.E.2d 427 (2010).

**Use of experts.**

Defendant's claim that counsel was ineffective for failing to seek funds to hire an expert witness failed because the defendant did not show that the outcome of the trial would have been different had counsel requested funds and called such a witness. The defendant did not proffer expert testimony at the hearing on the defendant's motion for new trial and thus did not show prejudice. *White v. State*, 293 Ga. App. 241, 666 S.E.2d 618 (2008).

With regard to a defendant's convictions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony, the defendant failed to establish that trial counsel's decision not to consult or hire an expert witness to support the defendant's defense of accident was deficient performance because trial counsel's testimony at the defendant's motion for a new trial set forth that trial counsel did not want to challenge the state's firearms expert on the issue of the force necessary to pull the trigger because the defendant had testified that the gun was in the waistband of the defendant's pants and it would not make sense to carry a weapon in that manner if the weapon discharged with little force. As a result, trial counsel's decision not to consult or hire an expert was reasonable, and matters of reasonable trial strategy and tactics did not amount to ineffective assistance of counsel. *Thomas v. State*, 284 Ga. 647, 670 S.E.2d 421 (2008).

In a murder prosecution, defense counsel was not ineffective for failing to properly interview a blood spatter expert before calling the expert as a witness. The expert's discussions with counsel provided support for the defendant's claim that the shooting was accidental, but at trial, the expert's testimony differed from the information relayed to counsel over the phone, and defense counsel was surprised by the testimony, which aided the prosecution. *Watkins v. State*, 285 Ga. 355, 676 S.E.2d 196 (2009).

While the defendant argued that the defendant's trial counsel was ineffective

for failing to hire an expert witness to testify regarding the child victims' allegations, the defendant failed to produce such an expert at the hearing on the motion for new trial, and the defendant did not proffer evidence showing how such an expert would have changed the outcome of the case; the defendant thus failed to establish the claim of ineffective assistance of counsel. *Sarratt v. State*, 299 Ga. App. 568, 683 S.E.2d 10 (2009).

Trial counsel's decision not to call an expert witness was within the realm of trial tactics and strategy and provided no basis for a claim of ineffective assistance of counsel because trial counsel testified that after conferring with the defendant, they decided together not to call the witness; in its order denying the defendant's motion for new trial, the trial court reviewed the evidence presented at the motions hearings and concluded that trial counsel provided a logical and strategic basis for not calling the defense expert as a witness during the trial. *O'Neal v. State*, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

Trial counsel did not render ineffective assistance by failing to subpoena a doctor and by failing to recognize that the doctor was a necessary witness for impeachment purpose because the defendant did not make the requisite showing of prejudice; the impeachment evidence purportedly contained in the doctor's medical report was cumulative of evidence that had already been placed before the jury, and the defendant did not allege or show that the doctor's testimony would have been beneficial to defendant's defense in any other respect. *Bearfield v. State*, 305 Ga. App. 37, 699 S.E.2d 363 (2010).

Defendant's trial counsel was not ineffective for failing to employ, or request funds from the trial court to employ, an expert witness to challenge an officer's testimony that the officer smelled the odor of raw marijuana emanating from the defendant's truck because the defendant was unable to overcome the presumption that counsel made a strategic decision regarding the issue that fell within the broad range of reasonable professional conduct; the defendant did not call trial counsel to testify at the hearing on the motion for new trial so that counsel could

explain why counsel did not attempt to employ an expert to challenge the officer's testimony. *Bass v. State*, 309 Ga. App. 601, 710 S.E.2d 818 (2011).

Trial counsel was not ineffective in failing to use an expert witness regarding the issue of consensual intercourse because trial counsel testified that counsel did not believe an expert witness would have been helpful to the defense; the defendant failed to make a proffer of any favorable evidence that could have been elicited if an expert witness had been called. *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

#### **Failure to hire defense reconstruction expert.**

With regard to a defendant's convictions on six counts of first degree vehicular homicide and other crimes, the defendant failed to establish ineffective assistance of counsel as defense counsel presented seven witnesses who testified that the defendant was not driving the vehicle at issue; the fact that certain photographs and blood test sampling were not presented into evidence and that there was a significant amount of other evidence that went to the defendant's defense that the defendant was not driving, it was a reasonable strategic decision not to hire an accident reconstruction expert. *Davis v. State*, 293 Ga. App. 799, 668 S.E.2d 290 (2008).

#### **Failure to hire gun residue expert.**

— In an aggravated assault prosecution, as the defendant denied involvement in the shooting but told police the defendant's hands would contain gunshot residue because the defendant had handled a gun that day, the defendant was not prejudiced by counsel's failure to order an independent gunshot residue test, which in light of the defendant's statement, would have been expected to yield a positive result. *Carlos v. State*, 292 Ga. App. 419, 664 S.E.2d 808 (2008).

#### **Failing to object to presence of interpreters.**

— With regard to two defendants' convictions for murder, the defendants failed to show that the defendants received ineffective assistance of counsel based on the defendants' respective trial counsel failing to object to the presence of two sign language interpreters in the jury

room as the trial court had the two interpreters take an oath swearing that, during jury deliberations, the interpreters would merely interpret and not interject the interpreters' personal opinions, conclusions, or comments. The defendants failed to present a shred of evidence that the interpreters did anything other than comply fully with the oath taken and that trial counsel had any reasons to suspect the interpreters did otherwise. *Smith v. State*, 284 Ga. 599, 669 S.E.2d 98 (2008).

**Failure to object to testimony of GBI agent.** — Trial counsel was not ineffective for failing to object to the testimony of a GBI Agent because counsel made a strategic decision not to object to the testimony, and that strategy was reasonable. *Wheeler v. State*, 290 Ga. 817, 725 S.E.2d 580 (2012).

**Failure to object to expert testimony.**

Defendant did not establish ineffective assistance of counsel based on defense counsel's failing to object to an expert's testimony despite the fact that counsel allegedly did not receive or review the psychosexual report prepared by the expert; there was conflicting testimony as to whether counsel had received the report, and even if counsel did not receive the report, there was no reasonable probability that the state's production of the report would have brought about a different result. *Brooks v. State*, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

The defendant's trial counsel was not ineffective in failing to object when a medical examiner testified that the victim's death was a homicide and not an accident, and despite the defendant's contrary claim, the testimony was not an expression of the witness's opinion on the ultimate issue in the case, as: (1) counsel did not consider the testimony objectionable because there was no dispute that the "manner" of the victim's death was a homicide, and such tactic was not unreasonable; (2) the ultimate issue for the jury to determine was whether the defendant acted with malice, in response to the victim's provocation, or whether self-defense was an issue; (3) counsel testified that an objection would have been in order had the medical examiner invaded the prov-

ince of the jury by expressing the opinion that the homicide was a murder; and (4) the defendant failed to show any prejudice by the testimony presented. *Berry v. State*, 282 Ga. 376, 651 S.E.2d 1 (2007).

Defense counsel was ineffective for failing to object to an expert's inadmissible hearsay testimony that a holster was designed for a .45 caliber pistol, which was based on the expert's conversation with a representative of the holster's manufacturer. The testimony was prejudicial, as it was the only evidence connecting the defendant to a .45 pistol and it buttressed the testimony of the state's key witness, whose credibility was a serious issue. *Cobb v. State*, 283 Ga. 388, 658 S.E.2d 750 (2008).

Counsel's failure to object when a sheriff's investigator testified was not ineffective assistance of counsel as the investigator did not state the investigator's opinion as to the veracity of the victims or the defendant; the investigator testified that the victims' injuries, or lack thereof, were either consistent or inconsistent with the physical evidence or the victims' testimony. Thus, the investigator's testimony was not objectionable as impermissible bolstering. *Gray v. State*, 291 Ga. App. 573, 662 S.E.2d 339 (2008).

Defendant failed to establish an ineffective assistance of counsel claim because, inter alia, the defendant's argument that the defendant did not have notice about the state's toxicologist testifying at trial was belied by the record; in the state's pretrial disclosure certificate, the state identified the toxicologist as a potential witness. Thus, an objection to the toxicologist testifying based on an alleged lack of notice would have been entirely without merit, and counsel's failure to object on this basis did not amount to ineffective assistance. *Rector v. State*, 285 Ga. 714, 681 S.E.2d 157, cert. denied, 558 U.S. 1081, 130 S. Ct. 807, 175 L. Ed. 2d 567 (2009).

Defense counsel's failure to object to a psychologist's testimony that the psychologist's evaluation strongly suggested that the victim was sexually abused as alleged was ineffective assistance because, considered in context, the testimony improperly amounted to a factual conclusion re-

garding whether the child was sexually abused and whether the defendant was the abuser; the expert's opinion was not superfluous, but usurped the jury's authority. It was highly probable that the failure to object to this testimony contributed to the guilty verdict. *Pointer v. State*, 299 Ga. App. 249, 682 S.E.2d 362 (2009).

Trial court did not err in denying a defendant's motion for a new trial based on the ineffective assistance of counsel in failing to object to an expert's opinion testimony because the record did not support the defendant's argument that the expert's testimony was objectionable; the expert's testimony was limited to describing how the expert and doctors in the medical community generally performed genital examinations of female patients and did not touch on whether either the defendant or the victim was telling the truth on whether the defendant committed aggravated sexual battery, and the expert's testimony regarding the typical medical examination of a preadolescent girl's genitals was relevant to the issues raised by the defendant's defense. *Lee v. State*, 300 Ga. App. 214, 684 S.E.2d 348 (2009).

Defendant unsuccessfully contended that defendant's trial counsel rendered ineffective assistance by failing to object to an FBI agent's testimony that the crime scene appeared to have been staged and that, based on this scene, burglary was an unlikely motive; furthermore, even if trial counsel had objected to this testimony, there was no reasonable probability that the outcome of defendant's trial would have been different, given the overwhelming nature of the evidence against the defendant. *Bridges v. State*, 286 Ga. 535, 690 S.E.2d 136 (2010).

Defendant did not establish that defendant's trial counsel was ineffective for failing to object to a child therapist's testimony on the ground that the testimony bolstered the child molestation victim's accusations because the therapist never expressly stated that the therapist believed the victim had been abused; although the defendant argued that the therapist's testimony was subject to that interpretation, the testimony the defendant cited did not address the ultimate

issue before the jury or bolster the victim's credibility. *O'Neal v. State*, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

Trial counsel was not ineffective for failing to object to the testimony of the crime scene investigator that a partial latent print on a handgun could have been the defendant's even though the investigator had also testified that the prints were insufficient to make an identification because in light of the investigator's testimony as a whole, trial counsel did not perform deficiently by failing to object, and the outcome would not have been different had counsel done so; by stating that the fingerprints were insufficient to make a match with anyone, the investigator in essence informed the jury that the fingerprints could have been made by anyone, including the defendant. *Odom v. State*, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010).

Trial counsel did not provide ineffective assistance when counsel failed to object to the State of Georgia reviewing an expert's notes at a hearing because trial counsel gave a reasonable strategic explanation for that decision — that there was nothing detrimental to the defendant in the notes. In addition, the defendant did not demonstrate that, even if trial counsel had objected, there was a reasonable probability that the result of the hearing would have been different. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

#### **Use of polygraphs.**

When the evidence shows that the defendant knew and understood his or her rights before he or she waived counsel and stipulated to the admissibility of polygraph results, the trial court's determination that the stipulation was valid is not clearly erroneous and will be affirmed. *Beaudoin v. State*, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

#### **Use of photographs.**

Because the second of two pre-autopsy photos of the clothed body of the victim was properly admitted as relevant in order to show the nature and extent of the victim's wounds, as well as to show that the body had been examined in preparation for autopsy, the defendant failed to show that counsel's performance as it re-

lated to the admission of the photo was deficient or that the result of the trial would have been different if counsel objected to the admission of the photograph. *Green v. State*, 282 Ga. 672, 653 S.E.2d 23 (2007).

Defendant could not establish that the defendant was prejudiced by defendant's trial counsel's failure to take and introduce into evidence photographs of the home where the defendant and the defendant's girlfriend resided in order to show the distance from the rear window, out of which the defendant's girlfriend escaped, to the ground below because the state introduced photographs of the back of the home, which included the rear windows; there is no ineffective assistance when trial counsel simply failed to introduce evidence cumulative of other evidence admitted at trial. *Carmichael v. State*, 305 Ga. App. 651, 700 S.E.2d 650 (2010).

Trial counsel was not ineffective in failing to move for a mistrial or request a curative instruction when the State of Georgia showed the jury two photographs of the murder victim's body at the crime scene, which the trial court had previously ordered the state not to show on the ground that the photographs were duplicative of other photographs. Given that the two photographs did not show the jury more than other crime scene photographs, and given the strength of the evidence against the defendant, the defendant failed to show that, even if trial counsel had moved for a mistrial or requested a curative instruction, there was a reasonable probability that the trial court would have granted a mistrial or that the outcome of the trial otherwise would have been different. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

**Failure to request admission of expert's report into evidence.** — In a murder prosecution in which the defendant claimed self-defense, a forensic toxicologist testified for the defense that the victim's blood tested positive for a metabolite of cocaine and that paranoia and aggressiveness were side effects of cocaine use. The defendant's claim that counsel was ineffective for withdrawing a request to admit the toxicologist's lab report into evidence failed as the results of the report

were read into the record, the toxicologist's testimony was more extensive than the report, and the defendant's assertion that admission of the report would have altered the outcome of the trial was mere speculation. *Timmreck v. State*, 285 Ga. 39, 673 S.E.2d 198 (2009).

**Medical evidence.**

Trial counsel was not ineffective for failing to present the victim's medical records because even assuming that trial counsel was remiss for failure to use the medical records in the attempt to block admission of the victim's statements as dying declarations, the defendant could not show any prejudice thereby; there was ample evidence to support the finding that the victim believed that the victim was in the article of death, and the statements were also admissible under the *res gestae* exception to the hearsay rule. *Sanford v. State*, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, U.S. , 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011).

Trial court properly rejected the defendant's claim that trial counsel was ineffective for failing to introduce into evidence two medical evaluation documents, which the defendant alleged would have contradicted statements witnesses gave to the police, because it was mere speculation that the witnesses' statements were inconsistent with the medical reports; it was impossible for the defendant to show there was a reasonable probability the results of the proceedings would have been different but for counsel's alleged error. *McClarin v. State*, 289 Ga. 180, 710 S.E.2d 120 (2011), cert. denied, U.S. , 132 S. Ct. 1004, 181 L. Ed. 2d 745 (2012).

**Failure to object to DNA evidence.**

— With regard to a defendant's conviction for statutory rape and two counts of child molestation involving a stepchild, the defendant's ineffective assistance of counsel claim as a result of failure to object to the state's DNA evidence was rejected because the defendant failed to show prejudice in that the outcome of the trial would have been no different had the DNA evidence not been admitted. The defendant's conclusory assertion that the conviction was largely based upon the DNA evidence was contradicted by the totality of the evidence in the record in that: (1) the jury

heard direct evidence from the victim that the defendant forced the victim to engage in sex with the defendant over a period of years; (2) the victim testified that the defendant fathered the victim's twins; and (3) the victim's mother testified as to the victim's prior consistent outcry statements, which the mother initially did not believe. *Haygood v. State*, 289 Ga. App. 187, 656 S.E.2d 541 (2008).

Trial counsel was not ineffective for failing to obtain an independent DNA analysis to challenge the state's findings because counsel's strategy in challenging the state's version of events was reasonable; the strategy was not rendered unreasonable just because another attorney could have approached the case under a different theory that would have required an independent DNA analysis. *Wheeler v. State*, 290 Ga. 817, 725 S.E.2d 580 (2012).

**Failure to seek DNA evidence.** — Trial court did not abuse the court's discretion in denying a defendant's motion to withdraw the defendant's guilty plea because the defendant failed to prove the prejudice prong of the defendant's ineffectiveness claim since, at the hearing on the motion to withdraw the plea, the defendant proffered no evidence that a deoxyribonucleic acid (DNA) test pursuant to O.C.G.A. § 5-5-41 would have rebutted the state's evidence, regarding defendant's incest conviction pursuant to O.C.G.A. § 16-6-22, that the defendant and the victim were half-siblings; in addition, counsel's strategy to forego a DNA test was one of trial tactics and did not provide a basis on which to find that counsel's representation was deficient. *Hunter v. State*, 294 Ga. App. 583, 669 S.E.2d 533 (2008).

Trial counsel was not ineffective because while the results of DNA testing of certain items recovered from the scene of armed robberies were favorable to the appellant, trial counsel used reasonable trial strategy in not requesting additional DNA testing based on a concern that such testing might implicate the appellant. *Boykins-White v. State*, 305 Ga. App. 827, 701 S.E.2d 221 (2010).

Trial counsel was not ineffective for failing to obtain either an independent test of the blood on the defendant's shoes

or an independent review of the lab's practices and procedures because defense counsel did not produce a DNA expert who would testify that the state's DNA evidence was defective, and the defendant's unfounded speculation as to the potential for a test result different from that introduced at trial did not constitute a showing of professionally deficient performance by counsel. *Lanier v. State*, 288 Ga. 109, 702 S.E.2d 141 (2010).

**Failure to object to search warrant affidavit from which DNA obtained.** — With regard to defendant's convictions for rape and other crimes, the trial court did not err by concluding that defendant's trial counsel was not ineffective for failing to object to a search warrant affidavit that led to the police obtaining a DNA swab from defendant, despite defendant's voluntary statement to the detectives being elicited in violation of *Miranda* and case law, as the search warrant could be predicated on defendant's voluntary but unlawfully obtained statements. *Brown v. State*, 292 Ga. App. 269, 663 S.E.2d 749 (2008).

**Mental health history as evidence.**

Habeas court erred by reversing a defendant's death sentence imposed for a murder based on the defendant's claim of ineffective assistance of counsel for trial counsel's failure to present evidence of the defendant's mental health status and for failing to present other mitigation evidence as, considering the combined effect of trial counsel's various professional deficiencies, as a matter of law, there was no possibility that absent trial counsel's professional deficiencies a reasonable probability existed that a different outcome would have occurred. *Schofield v. Cook*, 284 Ga. 240, 663 S.E.2d 221 (2008).

**Failure to have defendant psychiatrically evaluated.** — With regard to a defendant's conviction for statutory rape and two counts of child molestation involving a stepchild, the defendant's ineffective assistance of counsel claim as a result of failure to have the defendant evaluated for mental illness and incompetence before trial or before sentencing was rejected because defense counsel testified at the defendant's motion for a new trial hearing that: (1) defense counsel did not

know of the defendant's alleged prior history of psychiatric problems; (2) the defendant appeared to understand the communications that defense counsel had with the defendant; and (3) defense counsel did not explore the need for a psychological evaluation of the defendant because defense counsel did not see it as an issue. *Haygood v. State*, 289 Ga. App. 187, 656 S.E.2d 541 (2008).

#### **Failure to object to bolstering.**

A defendant's conviction for child molestation and related charges was upheld on appeal, and the trial court properly denied the defendant's motion for remand, as the defendant failed to show ineffective assistance of counsel as a result of defense counsel failing to object to the bolstering testimony of a child psychologist. The defendant failed to show how defense counsel's strategy, which resulted in leading the expert to qualify the prior bolstering testimony on cross-examination, was unreasonable, as well as failed to show a likelihood that an objection would have led to a different trial outcome necessitating remand. *Al-Attawy v. State*, 289 Ga. App. 570, 657 S.E.2d 552 (2008), cert. denied, No. S08C1039, 2008 Ga. LEXIS 503 (Ga. 2008).

As a child's alleged motive to fabricate arose after the child told the child's parent of being molested by the defendant, and after the child made a videotaped statement to an investigator, the parent's testimony about the child's accusation and the videotape were not admissible as prior consistent statements, but constituted impermissible bolstering. Defense counsel was ineffective in failing to object at trial; this failure harmed the defendant, thereby satisfying the prejudice prong of *Strickland*. *Cash v. State*, 294 Ga. App. 741, 669 S.E.2d 731 (2008).

Defense counsel was not deficient for failing to object to expert witnesses' testimony as to the truthfulness of the child victims because the testimony was not objectionable; testimony by a witness that he or she did not see any evidence that the child victim had been coached does not constitute bolstering of the child's credibility and does not impermissibly address the ultimate issue. *Vaughn v. State*, 307 Ga. App. 754, 706 S.E.2d 137 (2011).

Trial counsel's failure to object to a detective's testimony did not amount to deficient performance because the testimony was not a statement of the victim's credibility or an invasion of the province of the jury since the testimony concerned the detective's reason for ending the interview with the victim and referring the victim to the Georgia Center of Child Advocacy; even if the detective's testimony that "a molestation incident occurred" did constitute improper bolstering, the defendant failed to show a reasonable probability that the testimony so prejudiced the defense as to affect the outcome of the trial because the victim's account of the incident remained consistent throughout. *Strickland v. State*, 311 Ga. App. 400, 715 S.E.2d 798 (2011).

Trial counsel did not provide ineffective assistance by failing to timely object when a testifying police officer provided an opinion as to what was depicted in a convenience store's video surveillance footage while the video was being played for the jury because the officer's testimony was not improper bolstering; the officer was testifying as to the officer's own observations regarding the video. *Anderson v. State*, 311 Ga. App. 732, 716 S.E.2d 813 (2011).

Trial counsel was not ineffective for failing to object to a police detective's testimony regarding a victim's truthfulness because the defendant could not demonstrate either that trial counsel's performance was deficient or that the deficient performance prejudiced the defense since, in an initial statement, the victim identified three perpetrators by name and omitted the defendant entirely; therefore, the testimony exculpated the defendant, and it was highly unlikely that the testimony changed the outcome of the trial. *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Trial counsel did not err in failing to raise an objection to a detective's testimony regarding a forensic interview with the victim as improperly bolstering because the prosecutor's question appeared to have been directed at determining whether the victim provided information

that led to further investigation, not at determining whether the detective believed the victim was telling the truth. *Twiggs v. State*, 315 Ga. App. 191, 726 S.E.2d 680 (2012).

**Failure to object to admission of cocaine field test.** — With regard to defendant's appeal of a conviction for possessing cocaine, defendant's argument that defense counsel was ineffective in failing to object to the admission of a cocaine field test was meritless since significant evidence other than the field test supported the jury's verdict based on the officers finding a residue-laden scale commonly used to measure cocaine on defendant's person; following arrest, defendant displayed the same physical symptoms seen in persons who had swallowed cocaine when confronted by police; defendant had admitted to two people — an officer and a nurse — to swallowing the cocaine; and on two prior occasions leading to drug convictions, defendant attempted to discard cocaine to avoid detection by authorities. Moreover, defense counsel successfully undermined the field test, establishing through the state's own expert that the test was merely presumptive and lacked scientific certainty. *Hinton v. State*, 292 Ga. App. 40, 663 S.E.2d 401 (2008).

**Failure to introduce evidence.** — A defendant had not shown ineffective assistance of counsel, as counsel's failure to attempt to introduce into evidence additional photographs was not deficient performance when counsel testified that the state's photographs fairly illustrated the area in question and the defendant did not show anything to the contrary; counsel explained that a certain witness had not been called because the witness was clearly hostile toward the defendant, the defendant's claim that counsel should have introduced certain evidence rested on mere speculation, and the evidence showing the child victim walking through a store would have belied the defendant's assertion that the child had already been significantly injured before being left in the defendant's care. *Banta v. State*, 282 Ga. 392, 651 S.E.2d 21 (2007).

With respect to presenting chemical testing evidence and pursuing the state's

undisclosed chemical test results, counsel's failure to present or pursue such evidence did not affect the outcome at trial, and counsel's performance was not ineffective. The chemical test was consistent with evidence that the state had already presented to the jury; accordingly, the undisclosed evidence was not outcome determinative. *Morris v. State*, 284 Ga. 1, 662 S.E.2d 110, cert. denied, 555 U.S. 1074, 129 S. Ct. 731, 172 L.Ed.2d 734 (2008).

In a prosecution for first degree forgery, the defendant claimed defense counsel was ineffective in not introducing certain exculpatory e-mails. As the trial court found that everything contained in the e-mails was covered by the defendant's testimony, the defendant was unable to show any prejudice. *Taylor v. State*, 293 Ga. App. 551, 667 S.E.2d 405 (2008).

Defense counsel's decision not to play child victims' videotaped interviews for the jury was not ineffective assistance as counsel chose to highlight the victims' alleged inconsistencies by way of cross-examination. This reasonable and calculated tactical decision presented no grounds for reversal, and the defendant failed to show prejudice. *Scruggs v. State*, 294 Ga. App. 501, 669 S.E.2d 485 (2008), cert. denied, No. S09C0450, 2009 Ga. LEXIS 191 (Ga. 2009).

Trial court did not err in denying the defendant's motion for a new trial on the ground that defendant's trial counsel rendered ineffective assistance by failing to obtain an electronic enhancement of a videotape depicting a drug sale, which allegedly would have shown that defendant was not the perpetrator of the offense, because the defendant failed to show that the defendant was prejudiced as a result of trial counsel's failure to obtain an electronic enhancement of the videotape prior to trial since the enhanced images failed to create a reasonable probability that the defendant was not the perpetrator depicted in the images; an undercover officer unequivocally identified the defendant as the perpetrator based upon the officer's personal observations and independent memory of the defendant at the time of the drug sale, and although the defendant attempted to

prove that another individual was the perpetrator depicted in the videotape's images, the defendant failed to proffer sufficient evidence in support of the defendant's claim. *Faulkner v. State*, 304 Ga. App. 791, 697 S.E.2d 914 (2010).

Although the defendant claimed that the defense attorney failed to introduce evidence that would have allowed the jury to understand the reasonable nature of defendant's allegedly fearful state of mind with regard to the shooting victim, the defendant's attorney was able to elicit testimony from the defendant about the defendant's belief that the victim was dangerous. Therefore, the defendant did not prevail on the defendant's ineffective assistance of counsel claim because the defendant could not show that a reasonable probability existed that, but for counsel's errors in allegedly failing to introduce the evidence, the outcome at trial would have been more favorable. *Render v. State*, 288 Ga. 420, 704 S.E.2d 767 (2011).

Trial court did not err when the court denied the defendant's ineffective assistance of counsel claim because counsel testified that counsel attempted to produce evidence of specific acts of violence by the victim against third persons but because of lack of time was not able to do so; counsel further testified that counsel did not strenuously pursue a continuance for more time to gather such evidence because of the age of the case and because counsel believed such motion for continuance would be unsuccessful. *Rafi v. State*, 289 Ga. 716, 715 S.E.2d 113 (2011).

Trial counsel was not ineffective for failing to introduce photographs because counsel testified that counsel decided not to introduce the photographs since the photographs would have shown that there were numerous surveillance cameras at the scene; a decision not to introduce certain evidence is a strategic and tactical matter that cannot be judged by hindsight to support a claim of ineffective assistance of counsel. *Hammock v. State*, 311 Ga. App. 344, 715 S.E.2d 709 (2011).

Court of appeals could not review the defendant's claim that trial counsel erred by failing to follow proper procedures to introduce a psychologist's notes, which stated that the defendant suffered from

post-traumatic stress disorder because the defendant did not attach a copy of the psychologist's notes, proffer any testimony, or otherwise provide any information to support the claim that the defendant suffered from post-traumatic stress disorder. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Defendant did not receive ineffective assistance of counsel due to counsel's failure to subpoena an insurance company because the defendant did not show that such evidence was available, that the evidence was relevant to the charges, or that the evidence would have aided the defense. *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012), cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

#### **Failure to object to evidence.**

Because there was nothing improper in a statement the trial court made to the panel during voir dire, counsel did not perform deficiently by failing to object to the statement, and counsel was not ineffective for failing to object to properly admitted similar transaction evidence. *Edwards v. State*, 282 Ga. 259, 646 S.E.2d 663 (2007).

Because the defendant was lawfully arrested pursuant to the fifth warrant for the crime of armed robbery, and the warrant was sworn to, signed, and executed, the defendant's arrest was not illegal, and the defendant's fingerprints were not subject to exclusion; thus, trial counsel could not be found ineffective in failing to move for exclusion of the fingerprints. *Skaggs-Ferrell v. State*, 287 Ga. App. 872, 652 S.E.2d 891 (2007).

Defense counsel did not perform deficiently when defense counsel failed to make a meritless objection to the evidence of defendant's conviction for giving false information that was less than 10 years old as former O.C.G.A. § 24-9-84.1(a)(3) and (b) (see now O.C.G.A. § 24-6-609) authorized the admission of convictions 10 years old or less for crimes involving dishonesty or making a false statement, and the trial court did not have to weigh the probative value of the old conviction against the prejudicial effect since the conviction at issue was less than 10 years old. *Habersham v. State*, 289 Ga. App. 718, 658 S.E.2d 253 (2008).

Although defendant's trial counsel's performance fell below objective standard of reasonableness under the first prong of the Strickland ineffective assistance of counsel test, error however was harmless because although defendant's trial counsel performed deficiently in failing to raise a hearsay objection to admission of victim's statements contained in the videotaped interview, defendant did not show that trial counsel's error prejudiced the defense since statements made by the victim during the videotaped interview were merely cumulative of testimony victim had offered at trial and for which victim was cross-examined by trial counsel. *Forde v. State*, 289 Ga. App. 805, 658 S.E.2d 410 (2008).

Because: (1) the defendant failed to meet the burden of establishing that the state possessed favorable information, or that the trial's outcome might have been different if videotapes from the cameras on the vehicles of the two responding officers had been produced; and (2) counsel was not required to make an objection to the admission of similar transaction evidence since such would have been futile, the defendant was not entitled to a new trial as a result. *Hinton v. State*, 290 Ga. App. 479, 659 S.E.2d 841 (2008).

Trial counsel provided ineffective assistance by failing to object to witness testimony identifying the defendant as the person depicted in photographs derived from bank security videotapes. Trial counsel testified that the basis of the defense was misidentification, and inasmuch as the excludable testimony went to the heart of the defense, if the identification testimony had been excluded, there was a reasonable probability that the defendant would have been acquitted. *Grimes v. State*, 291 Ga. App. 585, 662 S.E.2d 346 (2008).

Defense counsel was not ineffective for failing to object to the state's introduction of evidence in aggravation of punishment on the ground that the notice was untimely and that the state had failed to list specifically what convictions were to be introduced. By filing notice five days before trial, the state had given timely notice under O.C.G.A. § 17-16-4, and the state, counsel, and the trial court had

discussed the prior convictions in detail at two pretrial hearings more than 60 days before trial. *McClam v. State*, 291 Ga. App. 697, 662 S.E.2d 790 (2008), cert. denied, 2008 Ga. LEXIS 798 (Ga. 2008).

Trial counsel's failure to object to an investigator's statements was not ineffective assistance of counsel since trial counsel was not questioned about counsel's failure to object to the investigator's allegedly improper testimony, and without trial counsel's testimony regarding this issue, it could not be assumed that counsel's actions did not fall within the wide range of reasonable professional assistance. *Shaffer v. State*, 291 Ga. App. 783, 662 S.E.2d 864 (2008).

Trial counsel was not ineffective for not objecting to testimony that the defendant had a "scraggly" appearance and was not well groomed when the defendant was arrested. Counsel testified that counsel did not consider this evidence of bad character and thought it might rebut the notion that the defendant was the type of person who would deal in 63 pounds of marijuana; moreover, any error in failing to object was harmless because the overwhelming evidence supporting the verdict rendered it highly unlikely that the testimony about the defendant's appearance contributed to the verdict. Finally, counsel's failure to object to evidence that a defendant had been incarcerated in connection with the crime for which the defendant was on trial did not place the defendant's character in issue and did not result in ineffective assistance. *Dade v. State*, 292 Ga. App. 897, 666 S.E.2d 1 (2008).

In a malice murder prosecution, the trial court did not abuse the court's discretion in admitting testimony concerning the violent relationship between the defendant and the victim (the defendant's paramour) as the testimony qualified as prior difficulties or similar transaction evidence. Defense counsel was not ineffective for failing to object to such testimony as the objection would have been overruled. *Smith v. State*, 284 Ga. 304, 667 S.E.2d 65 (2008).

As the state could not comment on a defendant's failure to come forward, defense counsel was ineffective in not object-

ing when the state elicited testimony that the defendant knew police were looking for the defendant in connection with the charged crimes, but did not contact the authorities. As the defendant testified about “bad blood” between the defendant and the victim, raising a credibility issue, there was a reasonable probability that counsel’s deficient performance affected the outcome, entitling the defendant to a new trial. *Johnson v. State*, 293 Ga. App. 728, 667 S.E.2d 637 (2008).

Any error by counsel in failing to object to the contents of a 9-1-1 call was cumulative of admissible evidence and therefore harmless. *Eller v. State*, 294 Ga. App. 77, 668 S.E.2d 755 (2008).

In a child molestation prosecution, as evidence of the defendant’s uncharged molestation of the victim was admissible without notice or a hearing, defense counsel was not ineffective for not objecting to such evidence. Furthermore, defense counsel was not ineffective for not objecting or requesting a mistrial after a witness testified that the defense had decided not to call the witness in its case in chief, as the testimony had little relevance to the facts in the case, and the trial court instructed the jurors at the close of evidence that the defendant had no burden of proof. *Stillwell v. State*, 294 Ga. App. 805, 670 S.E.2d 452 (2008), cert. denied, No. S09C0493, 2009 Ga. LEXIS 222 (Ga. 2009).

In a child molestation prosecution, counsel was not deficient for failing to object to evidence of the defendant’s alleged physical abuse of the victims, an uncharged crime, as counsel testified that the defense theory was that the children lied about being molested because the defendant was overly strict and spanked the children, and the children wanted to get the defendant out of the house. This was a strategic decision, not an oversight. *Ortiz v. State*, 295 Ga. App. 546, 672 S.E.2d 507 (2009), cert. denied, No. S09C0803, 2009 Ga. LEXIS 269 (Ga. 2009).

With regard to a defendant’s convictions for aggravated sodomy, rape, and other related crimes, trial counsel’s decision not to object to hearsay testimony of the emergency room physician who treated the

victim did not amount to ineffective assistance of counsel as the physician’s testimony was admissible under the hearsay exception set forth in former O.C.G.A. § 24-3-4 (see now O.C.G.A. § 24-8-803) since the challenged statements related to the cause of the victim’s injuries and were made for the purpose of the victim’s diagnosis and treatment. As a result, the trial court did not err in admitting the statements and, therefore, since the statements were admissible, there was no merit to the defendant’s contention that the defendant’s trial counsel’s failure to object to the hearsay testimony was ineffective assistance. *Greene v. State*, 295 Ga. App. 803, 673 S.E.2d 292 (2009), cert. denied, No. S09C0862, 2009 Ga. LEXIS 259 (Ga. 2009).

Even if a decision with regard to similar transaction evidence had the effect that the defendant claimed it did, it could not be used to support an ineffective assistance of counsel claim based on failure to object because it was decided after the defendant’s trial was completed. Failure to make a meritless objection did not amount to ineffective assistance of counsel. *Walley v. State*, 298 Ga. App. 483, 680 S.E.2d 550 (2009).

Defense counsel was deficient for failing to object to the admission, during the state’s case-in-chief, of a videotape of the defendant’s custodial interview, which was conducted in violation of *Miranda*. As there was reasonable probability that the outcome of the trial would have been different absent the admission of the defendant’s custodial statement, the defendant established ineffective assistance of counsel. *Frazier v. State*, 298 Ga. App. 487, 680 S.E.2d 553 (2009).

Counsel’s decision not object to evidence of the defendant’s public drunkenness arrest in an armed robbery trial did not constitute ineffective assistance because a gun found on the defendant during that arrest was relevant, the circumstances surrounding the gun’s discovery were part of the *res gestae*, and the gun’s admission was proper; given trial counsel’s testimony that trial counsel chose not to pursue a motion in limine because the gun was coming into evidence and trial counsel would rather the jury know that the

defendant came into possession of the handgun while intoxicated, rather than to speculate that the gun was for something more serious, the trial court was authorized to find that counsel's decision not to object to the evidence surrounding the gun's discovery was a matter of reasonable strategy. Even if the failure to request a limiting instruction was deficient performance, the lack of such an instruction was not prejudicial because evidence of public drunkenness was not so prejudicial that it would have swayed the jurors to convict, and, moreover, the evidence of guilt was overwhelming. *Bonker v. State*, 298 Ga. App. 867, 681 S.E.2d 256 (2009).

Trial counsel did not render ineffective assistance by failing to object to the state's evidence regarding life insurance policies covering the defendant's spouse because there was a nexus between the life insurance and the spouse's murder when independent evidence directly related the existence of the insurance policies to the defendant's motive for murder; the defendant asked the defendant's employer about insurance proceeds on the day the murder was discovered, the defendant made it clear to others that the defendant wanted and needed the insurance money, and the defendant explained to fellow inmates that, as a result of the defendant's commission of the murder, the defendant would be receiving a large sum in insurance proceeds. *Bridges v. State*, 286 Ga. 535, 690 S.E.2d 136 (2010).

Trial counsel did not render ineffective assistance by failing to object to testimony concerning incriminating statements the defendant made to a jail cell informant because the testimony was merely cumulative of the admissible testimony of two other fellow inmates; therefore, the defendant failed to show the requisite prejudice to support defendant's claim of ineffective assistance, and the trial court did not err in the court's determination that had trial counsel objected to the testimony, there was not a reasonable probability that the outcome of the trial would have been different. *Bridges v. State*, 286 Ga. 535, 690 S.E.2d 136 (2010).

Defendant could not establish that defendant's trial counsel was deficient for failing to object to inadmissible evidence

concerning other bad acts because trial counsel objected to the admission of the evidence and obtained a ruling from the trial court, and regardless of the format of trial counsel's objections, the allegations were made with sufficient specificity for the trial court to identify their precise basis since they specifically pointed out how the proposed evidence violated some established rule of evidence or procedure; even if counsel's performance was deficient, the defendant did not show there was a reasonable probability that the outcome of the trial would have been different but for counsel's purported omission because there was overwhelming evidence of the defendant's guilt. *Ellis v. State*, 287 Ga. 170, 695 S.E.2d 35 (2010).

Trial counsel was not ineffective for failing to object to the introduction of a recording of an accomplice's interrogation because the veracity of the accomplice was placed in issue by cross-examination regarding the accomplice's motives in testifying, and, therefore, the accomplice's prior consistent statements were admissible and were not improperly admitted to bolster the credibility of the accomplice in the eyes of the jury; the accomplice's statement explaining that the accomplice purchased a gun for the defendant because the defendant could not do so since the defendant had a criminal record and that the purpose of the crime was to obtain drugs were admissible to explain the accomplice's conduct. *Ward v. State*, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

Trial counsel was not deficient in declining to challenge the admission of the defendant's videotape police interview on the ground that the defendant was intoxicated because a detective testified at trial that the defendant appeared intoxicated but not to the point that the defendant was unable to comprehend the questions posed to the defendant and respond accordingly; the videotape clearly showed that the defendant was coherent and responsive during the course of the interview. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Trial counsel was not deficient in failing to challenge the admission of the defendant's videotape police interview on the ground that the defendant had requested

an attorney because the videotape itself showed the defendant waiving defendant's Miranda rights and consenting to speak with a detective without an attorney present, and at no point in the videotape did the defendant request an attorney; trial counsel was not required to anticipate that the defendant would take the stand and claim for the first time that the defendant had requested an attorney before speaking to the detective. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Trial counsel's failure to object specifically to admission of the sentencing portions of a juvenile court disposition order at trial constituted deficient performance because counsel's general relevancy objection and exception to a previous ruling made by another trial judge were not adequately specific and failed to give the judge presiding over the trial an opportunity to consider the need for redaction; there was a reasonable probability that the outcome of the defendant's rape and aggravated sodomy trial would have been different had the damaging information been excluded from the jury's consideration because the evidence was not overwhelming since the evidence was introduced that the defendant's encounter with the victim could have been consensual. *Higgins v. State*, 304 Ga. App. 771, 698 S.E.2d 335 (2010).

Defendant failed to show that defendant's trial counsel rendered ineffective assistance by failing to object when a police officer was recalled to the stand in order testify about some of the state's exhibits, by failing to object to the admission of those exhibits, and by failing to cross-examine the officer because trial counsel joined in the objection to the state's recalling of the officer that was made by codefendants' counsel, and the defendant failed to cite any grounds upon which defendant's counsel should have objected to the admission of the state's exhibits; the defendant failed to provide any evidence that cross-examination of the recalled officer would have affected the outcome of the trial. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Defendant failed to show that defendant's trial counsel's failure to object to

the admission of the state's fingerprint analysis was deficient performance because that evidence did not prejudice the defendant's trial strategy, which was to contest the occurrence of any kidnapping offense and concede the lesser crimes; there was no allegation in the record or on appeal that the state acted in bad faith in providing the defendant with the fingerprint analysis when it did, so the trial court was not required to exclude the evidence, and the defendant could not show that the trial court would have sustained an objection to the admission of the fingerprint report. *Thornton v. State*, 305 Ga. App. 692, 700 S.E.2d 669 (2010).

Defendant's trial counsel was not deficient in failing to object to the admission of a substance contained in the corner tie that defendant sold to the undercover officer as heroin on the ground that the state was unable to show the purity of the heroin it contained because the state was not required to establish the purity of the substance under O.C.G.A. § 16-13-31(b). *Thomas v. State*, 306 Ga. App. 279, 701 S.E.2d 895 (2010).

Trial counsel was not ineffective for failing to understand the contemporaneous objection rule because the defendant did not show that a reasonable probability existed that trial counsel's failure to object properly resulted in the admission of evidence, which if excluded, would have resulted in a different outcome; the defendant pointed to no evidence that was erroneously admitted because of trial counsel's deficient performance. *Chatman v. State*, 306 Ga. App. 218, 702 S.E.2d 51 (2010).

Trial counsel was not ineffective for failing to object to hearsay testimony that the person who was arrested with the defendant yelled that there was a gun in the car when the person and the defendant were apprehended because the defendant did not establish prejudice since there was direct evidence from an officer that a gun was found in the car. *Chatman v. State*, 306 Ga. App. 218, 702 S.E.2d 51 (2010).

Because a letter addressed to the defendant was relevant and admissible in the defendant's trial for theft by taking of a car, an objection to its admission would

have been futile, and trial counsel was not ineffective for failing to object; the letter, which was found inside a bag police officers found near a second stolen vehicle, was relevant and admissible to prove identity because the letter tended to prove that the bag found near the second vehicle belonged to the defendant, and that fact tended to prove that the defendant was, in fact, the person who stole the second vehicle. *Ferguson v. State*, 307 Ga. App. 232, 704 S.E.2d 470 (2010).

Trial counsel did not render ineffective assistance by failing to object, request a limiting instruction, or move for a mistrial in response to the testimony of the victim's cousin regarding an altercation between the victim and the defendant on the night before the shooting because the testimony was admissible under the necessity exception to hearsay as a prior difficulty, showing the defendant's motive, intent, and bent of mind; trial counsel was not deficient for failing to raise a meritless objection. *Evans v. State*, 288 Ga. 571, 707 S.E.2d 353 (2011).

Defendant did not receive ineffective assistance of trial counsel because the defendant did not show a reasonable probability that the outcome of the trial would have been different had trial counsel objected to the chain of custody of the sexual assault kit. *Neal v. State*, 308 Ga. App. 551, 707 S.E.2d 503 (2011).

Trial counsel was not ineffective for failing to object to the victim's in-court identification of the defendant because the victim's in-court identification of the defendant was not tainted since the victim immediately identified the defendant from a photo array three days after the incident; the booking photo was provided to the victim by the victim's civil attorney, and trial counsel's failure to object to the photo's introduction or to request that the in-court identification be struck was not deficient. *Delgiudice v. State*, 308 Ga. App. 397, 707 S.E.2d 603 (2011).

Trial counsel's performance was not deficient due to counsel's failure to object on grounds of relevancy to evidence concerning a partially-empty bottle of vodka found in the defendant's car upon the defendant's arrest because given the overwhelming evidence in the case, it was

highly likely that the evidence concerning the vodka bottle did not contribute to the guilty verdict and was therefore harmless; even assuming that the defendant's counsel was deficient in failing to object to the evidence concerning the vodka bottle found in the defendant's car, the defendant did not show a reasonable likelihood that, but for counsel's error, the outcome of the trial would have been different. *Brown v. State*, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

Defendant failed to establish that there was a reasonable probability that, but for the alleged deficiencies of trial counsel, the outcome of the trial would have been different because, even assuming that trial counsel performed deficiently by failing to object to character evidence, the defendant failed to show a reasonable probability that the outcome of the trial would have been different; the evidence of the crime charged was overwhelming. *Lowe v. State*, 310 Ga. App. 242, 712 S.E.2d 633 (2011).

Trial counsel was not ineffective for failing to object to the admission of the defendant's bloodstained clothes without a showing of a chain of custody because the defendant was unable to make the requisite showing of prejudice since the evidence against the defendant was strong, including that the defendant was obsessed with the victim and acted aggressively toward the victim for several months, the victim was stabbed more than 100 times, and the defendant broke into the victim's home on more than one occasion within days of the victims' death and assaulted and attempted to rape the victim at knife-point. *Simpson v. State*, 289 Ga. 685, 715 S.E.2d 142 (2011).

Trial counsel was not ineffective for failing to object to the admission of the defendant's bloodstained clothes without a showing of a chain of custody because the record showed that every police officer on duty the day of the defendant's arrest had actual knowledge of facts sufficient to support a finding of probable cause for the arrest; thus, the seizure of the defendant's bloody clothes after the arrest was proper. *Simpson v. State*, 289 Ga. 685, 715 S.E.2d 142 (2011).

Because evidence of the defendant's

prior drug use was introduced to show evidence of motive, it did not violate former O.C.G.A. § 24-2-2 (see now O.C.G.A. § 24-4-404); therefore, counsel was not ineffective for failing to raise a meritless objection. *Simons v. State*, 311 Ga. App. 819, 717 S.E.2d 319 (2011).

Defense counsel was not ineffective for failing to object to the authentication of a bank video that depicted the robbery because the defendant did not show that an objection to the authentication of the surveillance tape would have been sustained or a reasonable possibility that allowing the tape to be viewed by the jury changed the outcome of the trial; defense counsel testified that the person was completely covered, so the video would show what it showed but would not help in any way in pointing towards the defendant. *Williams v. State*, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Defendant was not prejudiced by trial counsel's failure to object to testimony speculating as to the defendant's state of mind because there was no reasonable likelihood that the testimony contributed to the guilty verdict on the lesser charge of attempted rape; the testimony regarding the victim's belief as to why the defendant was following the van in which the victim was traveling was not relevant to the consideration of the charges against the defendant, rape or attempted rape. *Gomez-Oliva v. State*, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Trial counsel was not ineffective for failing to object when the prosecuting attorney offered certified copies of the defendant's prior felony conviction to impeach the defendant's testimony under former O.C.G.A. § 24-9-84.1(a) (see now O.C.G.A. § 24-6-609) because the trial court properly could have concluded that the probative value of the conviction substantially outweighed any prejudicial effect, so the failure to object was not unreasonable; the prior conviction was recent, probative of the defendant's credibility as a testifying witness, and involved conduct dissimilar to the burglary for which the defendant was on trial. *Robinson v. State*, 312 Ga. App. 110, 717 S.E.2d 694 (2011).

Defendant could not demonstrate that the defendant was prejudiced by trial

counsel's failure to object to a witness's testimony because the gist of the testimony was that the shooting of the victim was unprovoked, and the defendant failed to show that, but for counsel's failure to object to the specific statements, the outcome of the trial would have been any different. *Nations v. State*, 290 Ga. 39, 717 S.E.2d 634 (2011).

Trial counsel was not ineffective for failing to object to evidence that the defendant had been fired, for violating a no-violence policy, from the restaurant which was robbed because the testimony was relevant to the issue of the defendant's motive for the defendant's actions and the evidence only incidentally placed the defendant's character into evidence. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Trial counsel was not ineffective in failing to object to testimony that a gun and ammunition, which were not alleged to be the murder weapon, were seized from the defendant's home and to the introduction of those items into evidence because the evidence was relevant and probative of the charge of possession of a firearm by a convicted felon, and an objection to its admissibility would have been fruitless. *Ardis v. State*, 290 Ga. 58, 718 S.E.2d 526 (2011).

Trial counsel was not ineffective in failing to object to the admissibility of a codefendant's custodial statement, which was redacted to eliminate the defendant's name and was read into evidence at trial, because the defendant did not show a reasonable likelihood that the outcome of the trial would have been different had counsel made a proper objection and succeeded in excluding the statement; the codefendant's statement was cumulative of other properly admitted evidence, and given the overwhelming evidence of the defendant's guilt, including the defendant's admission to a close friend that the defendant shot at the victim, any possible error was harmless beyond a reasonable doubt. *Ardis v. State*, 290 Ga. 58, 718 S.E.2d 526 (2011).

Because the defendant did not seek a hearing on the motion for a new trial or present evidence in support of the claim that trial counsel was ineffective for fail-

ing to redact bad character evidence from a witness's testimony, the defendant failed to show that trial counsel was deficient in the handling of the evidence or that there was a reasonable probability that the outcome of the trial would have been different if the testimony had been excluded. *Newkirk v. State*, 290 Ga. 581, 722 S.E.2d 760 (2012).

Defendant failed to demonstrate that trial counsel rendered ineffective assistance by failing to challenge the admission of bad character evidence against a codefendant because the defendant failed to call trial counsel as a witness during the motion for new trial hearing, and the record supported the trial court's finding that counsel made a conscious, strategic decision not to oppose the admission of evidence of the codefendant's cocaine conviction. *Smith v. State*, 316 Ga. App. 175, 728 S.E.2d 808 (2012).

Defendant failed to establish prejudice as a result of any failure on the part of trial counsel to object to the state's similar transaction evidence because there was overwhelming evidence against the defendant and, thus, the defendant could not show that the admission of the similar transaction evidence resulted in a guilty verdict. *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Defense counsel was not ineffective for failing to object to evidence that the defendant was angry at the victim because the victim failed to pay the defendant for drugs and started buying from another supplier as the evidence was relevant to motive and, thus, admissible. *Griffin v. State*, 292 Ga. 321, 737 S.E.2d 682 (2013).

Trial counsel was not ineffective for failing to object to an investigator's testimony that was not opinion testimony, but fact testimony which itself contained an opinion. Further, trial counsel was not ineffective for failing to object when an investigator testified that the defendant killed the victim or when a medical examiner testified that the death was a homicide as the identity of the person who caused the victim's death and the fact that the death was a homicide were not disputed; thus, the failure could not have affected the outcome of the trial. *Butler v. State*, 292 Ga. 400, 738 S.E.2d 74 (2013).

Trial counsel's failure to object to evidence of a past conviction for theft as well as the defendant's guilty plea for drug charges did not amount to ineffective assistance because trial counsel testified that trial counsel allowed the admission of the drug offenses because counsel was pursuing a strategy of admitting those offenses and denying the molestation. Furthermore, trial counsel's failure to object to testimony about the existence of pornography in the defendant's bedroom did not support a claim of ineffective assistance because the pornography itself was not admitted and the pornography was sufficiently relevant. *Worley v. State*, 319 Ga. App. 799, 738 S.E.2d 641 (2013).

**Failure to object to letter going to jury room during deliberations.** — Claim that defense counsel was ineffective for failing to prevent a letter written by a jailhouse informant from going into the jury room during deliberations failed because the defendant failed to show that there was a reasonable probability that the outcome of the trial would have been different since the contents of the letter were not particularly harmful to the defendant. *Young v. State*, 292 Ga. 443, 738 S.E.2d 575 (2013).

Defense counsel was not ineffective for failing to object when a witness read into the record a letter the witness received from the jailhouse informant because it was a reasonable trial strategy to introduce the letter so that defense counsel could refute the informant's claims on more than one occasion. *Young v. State*, 292 Ga. 443, 738 S.E.2d 575 (2013).

**Failure to object to admission of computer.** — Trial counsel was not ineffective for failing to object or move for a mistrial when a laptop computer found during a search was introduced into evidence because counsel sought to exclude the computer and the images and links through a pre-trial motion to suppress and a motion in limine, both of which the trial court denied, obviating the need for counsel to object again at trial. *Henry v. State*, 316 Ga. App. 132, 729 S.E.2d 429 (2012).

**Failure to object to evidence of incarceration.** — State of Georgia did not elicit improper character evidence from

the defendant, regarding the defendant's prior incarceration, during cross-examination as the defendant mentioned the prior incarceration during the defendant's testimony. Therefore, defense counsel's failure to object to the evidence of the defendant's prior incarceration was not ineffective assistance of counsel. *Baker v. State*, 307 Ga. App. 884, 706 S.E.2d 214 (2011), cert. denied, No. S11C0940, 2011 Ga. LEXIS 517 (Ga. 2011).

**Failure of counsel to listen to 9-1-1 call.** — Even if trial counsel was ineffective for failing to listen to a 9-1-1 tape prior to trial, given the overwhelming evidence supporting the defendant's convictions, particularly the eyewitness testimony, the defendant failed to show that there was a reasonable probability that the outcome of the trial would have been different but for counsel's error. Thus, this ineffectiveness claim failed. *Taylor v. State*, 295 Ga. App. 689, 673 S.E.2d 7 (2009), aff'd, 286 Ga. 328, 687 S.E.2d 409 (2009).

**Conceding to reliability of a child victim's hearsay testimony.** — Defendant failed to establish ineffective assistance of counsel with regard to defendant's trial and conviction for child molestation based on trial counsel's failure to object and conceding to the issue of reliability for the admission of the child victim's hearsay testimony as: (1) defendant failed to point to any evidence indicating that the victim's statements were unreliable since the statements were videotaped at a neutral location in a room alone with a professional forensic interviewer; (2) the forensic interviewer testified that the victim was very bright and articulate and did not appear to be coached; (3) the victim's videotaped statements were spontaneous, voluntary, and not coerced; (4) the victim's videotaped statements were consistent with other out-of-court statements; and (5) significantly, the victim's statements were consistent with defendant's statements to police. *Williams v. State*, 290 Ga. App. 841, 660 S.E.2d 740 (2008).

**New trial unwarranted where counsel's failure to object to evidence of prior DUI conviction did not result in prejudice.** — Defendant's ineffective

assistance of counsel claim did not warrant a new trial because sufficient evidence of the defendant's intoxication was presented in the record, and the defendant failed to show prejudice resulting from trial counsel's failure to object to defendant's admission to having a prior DUI conviction, even though it was error for trial counsel not to object. *Thomas v. State*, 288 Ga. App. 827, 655 S.E.2d 701 (2007).

**Alibi defense.**

Because the defendant failed to show that trial counsel was ineffective for failing to withdraw an alibi notice and failed to show prejudiced by the introduction of the notice, the defendant's ineffective assistance of counsel claim lacked merit. *Hester v. State*, 287 Ga. App. 434, 651 S.E.2d 538 (2007).

In a malice murder prosecution, as the defendant did not give defense counsel the correct phone number for an alleged alibi witness until trial was underway, and the witness was out of state and counsel was unable to convince the witness to appear voluntarily, counsel did not provide ineffective assistance. *Marshall v. State*, 285 Ga. 351, 676 S.E.2d 201 (2009).

Attorneys did not provide the defendant ineffective assistance when the attorneys failed to timely serve notice of the defendant's alibi evidence because the attorneys testified that the attorneys discovered a theoretical alibi defense when searching through phone records produced by the state in late November 2006, and the attorneys talked with potential alibi witnesses and then gave notice of the alibi on December 1, 2006; prior to that time, the attorneys had no independent evidence of an alibi. *Huckabee v. State*, 287 Ga. 728, 699 S.E.2d 531 (2010).

Trial counsel was not ineffective for failing to present an alibi defense because an appellant admitted that the appellant committed the armed robberies, and Ga. St. Bar R. 4-102(d):3.3(a)(4) prohibited trial counsel from knowingly offering false evidence. *Boykins-White v. State*, 305 Ga. App. 827, 701 S.E.2d 221 (2010).

Trial counsel's decision not to request the production of the duct tape that was used to bind the defendant when the defendant was allegedly kidnapped was not

patently unreasonable because the duct tape itself was cumulative of evidence that was introduced through the defendant's recorded police interview and trial counsel's cross-examination of a detective; even if it was assumed that trial counsel performed deficiently, the defendant proffered no evidence at the hearing on the defendant's motion for new trial that an analysis of the duct tape would have bolstered the defendant's alibi defense, and because the defendant did not proffer an analysis of the duct tape, the defendant failed to prove the prejudice prong of the ineffectiveness claim. *Buis v. State*, 309 Ga. App. 644, 710 S.E.2d 850 (2011).

Defendant failed to show a reasonable probability that the results of the proceeding would have been different had trial counsel presented an alibi defense through evidence that the victim was in another state during some of the dates alleged in the indictment because the defendant offered nothing more than mere speculation that the victim was not in the state during the dates listed in the indictment. *Davenport v. State*, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

Trial counsel was not ineffective for failing to present an alibi defense showing that the defendant was incarcerated during some of the time listed in the indictment because there was no evidence supporting an alibi defense; thus, the defendant did not meet the burden of showing a reasonable probability that the evidence would have affected the outcome of the trial. *Davenport v. State*, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

**Failure to present sleepwalking defense.** — Trial counsel was not ineffective for failing to assert a sleepwalking defense since the decision was based on counsel's belief that the jury was more likely to believe a defense based on the accidental discharge of a defective weapon. *Smith v. State*, No. S12A1978, 2013 Ga. LEXIS 258 (Mar. 18, 2013).

**Justification defense.**

In a malice murder trial, trial counsel, who relied on a defense of lack of malicious intent, was not ineffective for withdrawing a request to charge on justification. Self-defense was supported by only slight evidence at best, and such a defense

might have risked alienating the jury; moreover, defense counsel reasonably concluded that if the defendant sought a charge on self-defense, the state would request a charge on voluntary manslaughter. *Muller v. State*, 284 Ga. 70, 663 S.E.2d 206 (2008).

Because there was no evidence to support a justification defense pursuant to O.C.G.A. § 16-3-21(a), including defense of habitation under O.C.G.A. § 16-3-23, trial counsel's performance could not be considered deficient for failure to pursue those defenses. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

**Failure to present evidence of victim's violent act.** — When the defendant presented a prima facie case of justification, counsel was ineffective in not introducing evidence of a prior act of violence by the victim based on counsel's mistaken belief that such an act had to have occurred prior to the act being tried in order to be admissible. The error was not harmless, as the assault, which like the charged crime involved an assault with a gun upon a man leaving the residence of the victim's ex-spouse, was highly relevant to the sole defense of justification. *Bennett v. State*, 298 Ga. App. 464, 680 S.E.2d 538 (2009).

**No affirmative misrepresentations about effects of plea.** — Defendant's claim of ineffectiveness of first appointed counsel lacked merit as the defendant did not contend that counsel affirmatively misrepresented the defendant's eligibility or ineligibility for parole, but merely asserted that counsel failed to sufficiently explain Georgia's parole system to the defendant. *Toro v. State*, 319 Ga. App. 39, 735 S.E.2d 80 (2012).

**Plea deals.**

Because the defendant failed to present the testimony of either trial counsel to support a claim of ineffective assistance of counsel, and thus, the record of the new trial hearing was silent as to what actions were taken by counsel to prepare for the plea or to investigate the ramifications of the previous plea, the trial court did not err in denying the defendant's withdrawal of the plea. *Jackson v. State*, 288 Ga. App. 742, 655 S.E.2d 323 (2007).

An ineffective assistance claim based on

a guilty plea failed. The defendant did not assert that the defendant would have rejected the plea deal if counsel had told the defendant that the defendant was ineligible for parole or corrected the trial court's alleged misstatement about sentence review. *Leary v. State*, 291 Ga. App. 754, 662 S.E.2d 733 (2008).

It was error to deny an inmate's habeas petition when the only evidence of record, the inmate's affidavit, indicated that counsel gave erroneous advice that adversely affected the decision of the inmate, who entered into a negotiated plea, not to go to trial. Without a finding that counsel gave proper advice or that the inmate lacked credibility, the evidence did not support the conclusion that counsel was not deficient. *Garrett v. State*, 284 Ga. 31, 663 S.E.2d 153 (2008).

Evidence authorized the trial court to find that trial counsel's representation of the defendant in connection with an offered plea bargain was not deficient because the evidence showed that the defendant met with counsel several times prior to trial, the defendant discussed the facts of defendant's case with counsel, counsel explained to the defendant the problems defendant's custodial statement posed for the defense, and counsel set forth the potential sentence the defendant could expect if found guilty; after receiving advice from counsel, the defendant told counsel that the defendant still wanted to proceed to trial, and nothing in the record showed that the defendant was amenable to the state's plea bargain offer, as required for the defendant to demonstrate that the defendant was prejudiced by counsel's representation. *Miller v. State*, 305 Ga. App. 620, 700 S.E.2d 617 (2010).

Trial counsel was not ineffective for failing to adequately explain to the defendant the possibility that the defendant faced a mandatory life sentence or a sentence of life because the defendant did not carry the defendant's burden of proving that there was a reasonable probability that but for counsel's deficient performance, the defendant would have accepted the state's plea offer; counsel testified that counsel discussed the plea offer with the defendant, told the defendant that the defendant was facing a possible

life sentence or life without parole, and tried to explain the recidivist statute, but the defendant did not want to talk about it, and the defendant further testified that when the counsel attempted to discuss the details of the plea, defendant repeatedly said that it was not good enough and that counsel needed to do better. *Chatman v. State*, 306 Ga. App. 218, 702 S.E.2d 51 (2010).

Plea counsel did not perform deficiently for failing to investigate a robbery charge in another county because the defendant's only available means to withdraw the defendant's guilty plea to the robbery charge was through habeas-corpus proceedings; the defendant's first mention of any challenge to the defendant's plea of guilty to the robbery charge was well beyond the term of court in which the defendant was sentenced. *Murray v. State*, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

Habeas corpus petitioner failed to prove that trial counsel's performance was professionally deficient because trial counsel did not fail in the duty to offer the petitioner informed advice regarding the state's plea agreement offer; the petitioner admitted that the petitioner never told trial counsel that the petitioner wished to plead guilty, and trial counsel did not act in an unreasonable or professionally deficient manner in concluding that the petitioner had decided to let the petitioner's father speak for the petitioner and wished to reject the state's offer. *Cammer v. Walker*, 290 Ga. 251, 719 S.E.2d 437 (2011).

Defendant's allegations of ineffective assistance of counsel failed because the court credited trial counsel's testimony that trial counsel fully explained the evidence and the strength of the state's case to the defendant, conveyed all plea bargain offers from the state to the defendant, and the defendant rejected those offers. *Butler v. State*, 319 Ga. App. 350, 734 S.E.2d 567 (2012).

#### **Failure to obtain a plea agreement.**

Defendant failed to show that counsel was ineffective due to counsel's alleged failure to engage in plea negotiations with respect to the defendant's multiple pending armed robbery charges as the failure

to initiate plea negotiations by counsel did not, without more, constitute deficient performance. *Simmons v. State*, 309 Ga. App. 369, 710 S.E.2d 193 (2011).

**Miscommunication on plea deal.** — Although the defendant claimed that the defendant's trial counsel was ineffective in forwarding to the defendant a plea offer that was meant for another client and in failing to ensure that the defendant understood the statutory range of the defendant's sentence, the record showed that trial counsel informed the defendant later that month that counsel had sent the letter in error and that the plea offer the letter contained was not available to the defendant; the defendant presented no evidence that trial counsel's mistake led the defendant to plead guilty some five months later. Even assuming that trial counsel failed to properly ensure that the defendant understood the statutory range, the defendant's alleged confusion was corrected by the trial court before the defendant entered the plea, and the defendant presented no evidence that the defendant otherwise would have insisted on proceeding to trial. *Frye v. State*, 298 Ga. App. 415, 680 S.E.2d 431 (2009).

**Guilty pleas.**

Because the defendant failed to show sufficient evidence of a psychological impairment, due in part by ceasing to take needed medication, sleep deprivation, racing thoughts or other psychological turmoil, or that trial counsel was ineffective as to counsel's advice regarding sentencing as a recidivist under O.C.G.A. § 17-10-7, the appeals court agreed that a guilty plea was intelligently and voluntarily entered; thus, the trial court properly denied a motion to withdraw it. *Frost v. State*, 286 Ga. App. 694, 649 S.E.2d 878 (2007).

The trial court properly denied the defendant's motion to withdraw a guilty plea to a charge of malice murder, because sufficient evidence was presented to support a finding that: (1) counsel did not render ineffective assistance in advising the defendant as to said plea; (2) counsel attempted, albeit unsuccessfully to pursue a voluntary manslaughter defense and plea deal with the state; (3) the defendant was generally competent at the time

of the murder; (4) a statement by a proposed expert witness in support of said defense would have been inadmissible as an opinion on the ultimate issue and could not, in any event, have helped the defendant's case; and (5) the viability of any type of voluntary manslaughter defense was highly unlikely. *Trauth v. State*, 283 Ga. 141, 657 S.E.2d 225 (2008).

Trial court properly denied defendant's motion to withdraw defendant's guilty plea to possession of cocaine and possession of tools for the commission of a crime charges as defendant failed to show that the plea was not knowingly, intelligently, and voluntarily entered as the colloquy of the trial court indicated that defendant was properly questioned and that defendant's responses established that the plea and circumstances were understood and that defendant was satisfied with trial counsel. Further, the defendant failed to establish that defendant was rendered ineffective assistance of counsel based on trial counsel purportedly not explaining that the state was incapable of meeting its burden on a trafficking charge, causing defendant to believe that the reduced charges were a part of a negotiated plea agreement, as defendant testified that defendant informed trial counsel that defendant would take a plea if the trafficking offense was reduced. *Franklin v. State*, 291 Ga. App. 267, 661 S.E.2d 870 (2008).

With regard to defendant's conviction for pimping, defendant failed to establish that defendant was rendered ineffective assistance of counsel as a result of defense counsel allegedly failing to advise defendant as to the consequences of a guilty plea as defendant failed to show how further consultation with defense counsel would have impacted the decision to enter a guilty plea and defendant failed to show how, but for counsel's performance, defendant would not have pled guilty and proceeded to trial. *Burroughs v. State*, 292 Ga. App. 580, 665 S.E.2d 4 (2008), cert. denied, No. S08C1930, 2008 Ga. LEXIS 930 (Ga. 2008).

Pursuant to the record of the defendant inmate's plea hearing, the trial court properly provided advice regarding the rights being waived by the inmate's entry of a plea as well as the maximum sentences

that could be imposed; there was no ineffectiveness in counsel's failure to inform the inmate of the right to appeal, and the trial court had no duty to inform the inmate that there was possibly a right to appeal from convictions that resulted from the guilty plea. *Powell v. State*, 297 Ga. App. 833, 678 S.E.2d 524 (2009).

Defendant, who sought to withdraw an Alford plea, did not show that the defendant misunderstood the state's recommendation concerning credit for time served or that counsel failed to listen to the defendant, much less that the defendant would have insisted on going to trial had the defendant been counseled properly. Thus, the defendant failed to prove that plea counsel was ineffective on this ground. *Skinner v. State*, 297 Ga. App. 828, 678 S.E.2d 526 (2009).

Trial court properly denied a defendant's motion to withdraw a guilty plea to voluntary manslaughter. Pretermittting whether counsel's performance was deficient, the defendant failed to establish a reasonable probability that the defendant would have insisted on a trial if the defendant had always known the defendant could be sentenced to serve 15 years instead of 10; furthermore, the defendant would have been tried for felony murder had the defendant gone to trial. *Johnson v. State*, 298 Ga. App. 197, 679 S.E.2d 763 (2009).

Defendant, who pled guilty to theft by shoplifting, did not establish that the defendant received ineffective assistance of counsel due to trial counsel's failure to interview and subpoena witnesses because the defendant did not demonstrate that there was a reasonable probability that the defendant would have insisted on going to trial but for trial counsel's failure to interview any potential witness, and the defendant failed to produce any such witness at the hearing on the motion to withdraw the defendant's plea; evidence supported the trial court's finding that the defendant was motivated to plead guilty after viewing a video of the defendant committing the crime and not as a result of any purportedly deficient performance by counsel. *Trapp v. State*, 309 Ga. App. 436, 710 S.E.2d 637 (2011).

Trial court was authorized to find that

trial counsel's alleged deficiency of misinforming the defendant about the eligibility for parole was not prejudicial and did not present a manifest injustice requiring withdrawal of the defendant's guilty plea because at the hearing conducted on the defendant's motion to withdraw the guilty plea, trial counsel testified that counsel had explained to the defendant that it was within the parole board's discretion to decide the parole issue and that no promises or guarantees could be made as to the length of the defendant's incarceration; the trial court was authorized to find that the defendant was not primarily concerned about parole eligibility but rather was concerned about proceeding to trial on the more serious charges before a jury that the defendant did not deem as being favorable because the defendant testified that the defendant did not like the composition of the potential jurors and wanted to put off the trial, and when trial counsel expressed uncertainty regarding how the defendant's probation revocations would affect parole eligibility, the defendant did not inquire further. *James v. State*, 309 Ga. App. 721, 710 S.E.2d 905 (2011).

Trial counsel's advice to the defendant regarding the effect of a guilty plea did not constitute ineffective assistance of counsel because trial counsel correctly advised the defendant that once the defendant entered the guilty plea, the defendant was subject to being deported to Mexico as did the state and the trial court during the plea hearing; the defendant admitted being in the United States illegally, United States Immigration and Customs Enforcement already had a hold on the defendant, and in addition to the felony child endangerment plea, the defendant was entering a third DUI plea within the past year. *Lopez v. State*, 309 Ga. App. 756, 711 S.E.2d 345 (2011).

Trial court did not abuse the court's discretion when the court denied the defendant's motion to withdraw a guilty plea on the defendant's claim that plea counsel failed to explain the consequences of the non-negotiated guilty plea because the record supported the trial court's conclusion that the defendant knowingly and intelligently entered the guilty plea; during the plea hearing, the defendant con-

firmed that counsel discussed the plea petition and waiver-of-rights form with the defendant and that the defendant understood the form; the defendant then responded affirmatively when the state's prosecutor asked if the defendant understood the rights the defendant was waiving by pleading guilty, and the defendant affirmatively stated that the defendant understood when the trial court reiterated the rights the defendant was waiving by pleading guilty. *Earley v. State*, 310 Ga. App. 110, 712 S.E.2d 565 (2011).

Because the defendant declined the opportunity at a plea hearing to discuss any concerns with counsel's representation, the defendant failed to demonstrate that counsel was ineffective; therefore, the trial court did not abuse the court's discretion in denying the defendant's motion to withdraw the defendant's plea on that basis. *Norwood v. State*, 311 Ga. App. 815, 717 S.E.2d 316 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion to withdraw a guilty plea on the grounds of ineffective assistance of counsel because counsel informed the defendant of the state's extended plea offer and fully advised the defendant about the process; counsel informed the defendant that the defendant faced a possible recidivist punishment, that the state would withdraw the state's plea offer if it revealed the identity of the confidential informant, and that if the defendant rejected the offer, the only options were to enter a blind plea or proceed to trial. *Arnold v. State*, 315 Ga. App. 831, 728 S.E.2d 342 (2012).

Trial court did not err in finding that the defendant failed to establish an ineffectiveness claim because the defendant was adequately advised regarding the plea offer, the options, and the risks, but the defendant rejected the state's plea offer; having received the full and careful advice of counsel, the ultimate decision of whether to plead guilty belonged to the defendant. *Cruz v. State*, 315 Ga. App. 843, 729 S.E.2d 9 (2012).

Trial court did not err in denying the defendant's motion to withdraw a guilty plea based upon ineffective assistance of counsel because the record authorized the

trial court to reject the defendant's claim that counsel's performance was deficient and that there was a reasonable probability that, absent the deficiency, the defendant would not have pled guilty; counsel testified that prior to the plea hearing, counsel reviewed with the defendant all of the evidence obtained through discovery and that counsel and the defendant had agreed on the strategy. *Davis v. State*, No. A12A0674, 2012 Ga. App. LEXIS 583 (June 27, 2012).

**Failure to object to reference to codefendant's guilty plea.** — Because the defendant did not show that there was a reasonable probability that the outcome would have been different if counsel had objected to a reference to a codefendant's guilty plea during the state's opening, the court did not have to determine whether counsel was deficient; furthermore, the jury was charged that opening statements were not evidence. *Wilcox v. State*, 297 Ga. App. 201, 677 S.E.2d 142 (2009), cert. denied, No. S09C1285, 2009 Ga. LEXIS 342 (Ga. 2009).

**Advice not to testify.** — In a malice murder trial, trial counsel was not ineffective in advising the defendant not to testify even though only the defendant could have supplied the details surrounding the shooting, given the weakness of the state's case, the trial court's permission to argue justification without using the word, the defendant's reluctance to testify, the belief that the state's rebuttal witnesses would be very hostile, and the desire to eliminate the possibility of a voluntary manslaughter instruction. *Muller v. State*, 284 Ga. 70, 663 S.E.2d 206 (2008).

Defense counsel was not ineffective for interfering with the defendant's right to testify at trial as: (1) counsel informed the defendant that, although the defendant had an absolute right to testify, counsel believed that it was in the defendant's interest not to testify for strategic reasons; and (2) based on the reasonable advice of counsel, the defendant voluntarily chose not to testify. *Dixon v. State*, 285 Ga. 312, 677 S.E.2d 76 (2009), overruled on other grounds, 287 Ga. 242, 695 S.E.2d 255 (2010).

**Advising on sentencing.**

The defendant, who sought to withdraw

a guilty plea on the ground that defense counsel was ineffective, did not show that defense counsel was deficient; the trial court had found that defense counsel was more credible than the defendant on the question of whether counsel had advised the defendant that the defendant, who had pled guilty to armed robbery, would not be eligible for parole or sentence review. *Carson v. State*, 286 Ga. App. 167, 648 S.E.2d 493 (2007).

Defendant failed to show that defendant received ineffective assistance of counsel with regard to being coerced or deceived by counsel as to length of sentence that could be imposed, and trial court did not err by denying defendant's motion to withdraw guilty plea entered into, because record did not support defendant's claim that counsel deceived him about the length of the sentence as defendant was advised of the maximum possible sentence and was told that there was no guarantee as to length of sentence that would be imposed. *Brantley v. State*, 290 Ga. App. 764, 660 S.E.2d 846 (2008).

In a prosecution for possession of methamphetamine, the defendant claimed defense counsel was ineffective for failing to advise the defendant of the possibility of receiving a prison sentence without the possibility of parole. This claim failed as the trial court was entitled to believe trial counsel's testimony that counsel advised the defendant of this possible sentence before the defendant elected to go to trial. *Matthews v. State*, 294 Ga. App. 836, 670 S.E.2d 520 (2008).

It was proper to deny a defendant's motion for new trial based on ineffective assistance. There were opposing arguments, each supported by the record, as to whether the defendant would have pled guilty had counsel correctly informed the defendant of the mandatory minimum sentence, which presented factual matters primarily for resolution by the trial court. *Childrey v. State*, 294 Ga. App. 896, 670 S.E.2d 536 (2008).

Defendant could not establish that defendant's trial counsel provided ineffective assistance by failing to advise the defendant that entering a guilty plea to two counts of molestation would subject the defendant to the state probation office's

sex offender treatment program because the transcript of the plea hearing plainly reflected that both the prosecutor and the trial court expressly advised the defendant that the defendant would be required to comply with any and all screening and treatment recommendations of the state probation office as a special condition of defendant's probation; therefore, even if trial counsel failed to advise the defendant on those matters, the defendant was made cognizant of them prior to entry of defendant's plea but nevertheless chose to plead guilty, and the defendant could not demonstrate that the defendant was prejudiced by any failure of defendant's trial counsel to advise the defendant that the defendant would have to comply with all treatment recommendations of the probation office. *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

Trial counsel's failure to advise a client that pleading guilty will require him or her to register as a sex offender is constitutionally deficient performance; even if registration as a sex offender is a collateral consequence of a guilty plea, the failure to advise a client that his or her guilty plea will require registration is constitutionally deficient performance because prevailing professional norms support the view that defense counsel should advise their clients concerning registration as a sex offender prior to entry of a guilty plea. *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

Trial court erred in denying the defendant's motion to withdraw defendant's guilty plea to two counts of child molestation because defendant's trial counsel failed to advise the defendant that entering a plea of guilty to child molestation would necessitate that the defendant comply with the requirements of the state's sex offender registry statute, O.C.G.A. § 42-1-12; the defendant was subject to the sex offender registration requirements at the time that the defendant entered into defendant's plea, the terms of the sex offender registry statute were succinct, clear, and explicit in setting forth the consequences of defendant's guilty plea, and defendant's trial counsel could have readily determined that the defendant was required to register and con-

veyed that information to the defendant. *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

Defendant juvenile did not receive ineffective assistance of counsel because trial counsel testified that counsel met with the defendant several times and conveyed the sentencing offer to the defendant; although the defendant testified that counsel visited the defendant only twice and never communicated any information about the evidence that would be presented at trial or that the state had presented any plea offers, the juvenile court was authorized to believe counsel's testimony over the defendant's testimony. *In the Interest of K.F.*, 316 Ga. App. 437, 729 S.E.2d 575 (2012).

Defendant failed to demonstrate ineffective assistance of counsel during the plea process based on counsel's alleged promise regarding the sentence to be imposed because the trial court expressly found that the defendant's testimony regarding what counsel told the defendant about the sentence that would be imposed lacked credibility and was contradicted by the testimony of counsel and the evidence of record. *Davis v. State*, No. A12A0674, 2012 Ga. App. LEXIS 583 (June 27, 2012).

**Performance of counsel during sentencing.** — Trial counsel was not ineffective for remaining silent during sentencing when the prosecutor erroneously stated that the defendant did not have a right to file a petition for a writ of habeas corpus because the record reflected that the defendant's trial counsel responded that the defendant had a right to file a habeas petition. Additionally, after announcing the court's sentence, the trial court advised the defendant that the defendant had the right to challenge the convictions in habeas proceedings. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

**Failure to advise defendant of prosecution as recidivist.** — A trial court did not err in denying defendant's motion for new trial on the grounds of ineffective assistance of counsel with regard to the defendant's drug-related convictions based on defense counsel failing to advise defendant that the state intended to prosecute defendant as a recidivist since de-

fendant did not testify that defendant would have accepted a plea offer if defendant had known that defendant was facing the prospect of being sentenced as a recidivist, thus, defendant failed to show that counsel's alleged deficiency affected the end result of the case. Furthermore, defendant did not show in the record that the state made or was amenable to any plea negotiations. *Heard v. State*, 291 Ga. App. 550, 662 S.E.2d 310 (2008).

**Failure to request redaction of drug reference in 9-1-1 tape.** — Trial counsel was not ineffective for failing to request redaction of drug references in a 9-1-1 tape as the defendant could not demonstrate the prejudice necessary to establish ineffective assistance of counsel since the defendant subsequently injected the issue of drugs into the case by testifying that the victim's home was a crack house and that the victim set the defendant up in order to protect the victim's grandchild, an alleged drug dealer. *Atwell v. State*, 293 Ga. App. 586, 667 S.E.2d 442 (2008).

**Objections to prosecutor's argument.**

The defendant's ineffective assistance of counsel arguments failed where, because the prosecutor's suggestion in closing argument that the victim was bending when the victim was shot was authorized by the physical evidence, trial counsel was not ineffective for failing to object to the prosecutor's argument; although the defendant alleged that trial counsel failed to subpoena trial witnesses, the defendant admitted that there was no failure to introduce critical testimony at trial. *Winfrey v. State*, 286 Ga. App. 718, 650 S.E.2d 262 (2007).

Because the defendant's trial counsel was not ineffective in presenting a defense and requesting jury instructions on the defendant's claim of innocence, and was authorized to forego objection to a challenged portion of the state's closing argument, the defendant's ineffective assistance of counsel claims lacked merit and did not warrant a new trial. *King v. State*, 282 Ga. 505, 651 S.E.2d 711 (2007).

While the defendant's trial counsel was ineffective in failing to object to that portion of the state's closing argument in

which the prosecutor referenced a slain officer's funeral a week prior, as that fact had no relevance to the charges the defendant was facing, based on the overwhelming evidence of guilt, including the defendant's admission, the defendant's convictions for trafficking in cocaine and possession of cocaine with intent to distribute were upheld on appeal; thus, a new trial was properly denied. *Cantrell v. State*, 290 Ga. App. 651, 660 S.E.2d 468 (2008).

At a trial for trafficking in cocaine and for possession of cocaine with intent to distribute, trial counsel was ineffective for not objecting when the prosecutor, in closing, described attending the funeral of a police officer killed in the line of duty, as this tragic and emotionally charged event had no relation to the evidence admitted or the case at hand. The defendant, however, had not shown prejudice from counsel's deficient performance, as the defendant admitted having cocaine before being chased by police officers, an officer saw the defendant throw down a large bag while the defendant was being chased, and a large amount of cocaine was recovered in this same location, less than 40 yards from where the defendant surrendered. *Cantrell v. State*, 290 Ga. App. 651, 660 S.E.2d 468 (2008).

In a rape case, as the prosecutor did not offer a personal belief about the veracity of an eyewitness and victim during closing argument, but instead argued that based on the facts and reasonable inferences drawn therefrom, the jury should conclude that those witnesses were telling the truth, defense counsel was not ineffective in failing to object to the argument. *Brown v. State*, 293 Ga. App. 633, 667 S.E.2d 899 (2008).

Trial counsel was not ineffective for failing to object to statements made by the prosecutor in opening and closing arguments because the statements were but a small part of a summary of the evidence best understood as conceding the ambiguities therein and were unlikely to be interpreted as comments on the defendant's failure to testify. *Odom v. State*, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010).

Trial court did not err in denying the defendant's claim of ineffectiveness of counsel on the ground that trial counsel should have objected to the prosecutor's closing argument that the incident took place in a residential area and that the incident could have endangered innocent women and children because the defendant did not show how the outcome of the trial would have been different had counsel objected to the second reference made by the prosecutor, and the trial court instructed the jury that the evidence did not include opening and closing statements of the attorneys. *Odom v. State*, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010).

Defendant did not receive ineffective assistance of counsel when the defendant's trial counsel failed to object to the state's opening argument because no reversible error occurred with respect to the prosecutor's opening statement; the prosecutor had a good faith belief at the time that the prosecutor made the prosecutor's opening statement that a witness would testify that the witness saw the defendant with a gun, and the jury was instructed that the prosecutor's opening statement was not evidence. *Jennings v. State*, 288 Ga. 120, 702 S.E.2d 151 (2010).

Defendant's trial counsel was not ineffective in failing to object to statements the prosecutor made during closing argument because counsel did object, and his objection was successful; while the defendant asserted that counsel should have further moved for a mistrial, such decisions generally fell within the ambit of strategy and tactics. *Wilson v. State*, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Counsel was not deficient in failing to object to the prosecutor's victim impact argument during opening statement because negative characterizations of the victim were proper since the characterizations were relevant to evidence later offered to explain the context in which the drug-related crimes occurred, and the prosecutor's allusion to the fact that the victim was no longer alive was relevant to the murder charge; a witness's testimony and photographs of the witness's injuries were directly relevant and admissible to

prove the charge against the defendant of committing aggravated assault on the witness. *Lacey v. State*, 288 Ga. 341, 703 S.E.2d 617 (2010).

Defendant's trial counsel was not ineffective for failing to object to arguments made by the prosecutor during closing arguments because the defendant failed to show either that trial counsel performed deficiently in failing to object or that the outcome of the trial would have been different had counsel objected under the standard of *Strickland*. *Fletcher v. State*, 307 Ga. App. 131, 704 S.E.2d 222 (2010).

Trial court did not err in denying the defendant a new trial on the ground that the defendant's trial counsel's failure to object to the prosecutor's statement during closing argument amounted to ineffective assistance because the defendant could not demonstrate that the deficiency in trial court's performance prejudiced the defendant; the evidence of the defendant's guilt was overwhelming, and there was no reasonable probability that the outcome of the defendant's trial would have been more favorable had trial counsel objected, even successfully, to the prosecutor's statement in argument. *Jones v. State*, 288 Ga. 431, 704 S.E.2d 776 (2011).

Defendant did not show that trial counsel was ineffective by failing to object to the prosecutor's improper argument because the prosecutor's comments, when read as a whole, did not constitute a warning to the jury regarding the defendant's future actions if the defendant remained free, but instead constituted a comment on the evidence, including the defendant's molestation of the similar-transaction victim. Even if the argument did violate the prohibition against future-dangerousness arguments by the state of Georgia, it was highly unlikely that this single portion of the prosecutor's closing argument contributed to the guilty verdict, given the evidence presented against the defendant. *Cobb v. State*, 309 Ga. App. 70, 709 S.E.2d 9 (2011).

**Counsel's failure to object to a municipal court judge's improper testimony about the defendant's future dangerousness** was not ineffective assistance as a matter of law. *Bass v. State*, 288

Ga. App. 690, 655 S.E.2d 303 (2007), rev'd on other grounds, 2009 Ga. LEXIS 31 (Ga. 2009).

A defendant did not show that trial counsel was ineffective by moving for a directed verdict at the close of the state's evidence, thereby allowing the state to introduce additional evidence when the motion was denied. Trial counsel testified at the motion-for-new-trial hearing that moving for a directed verdict was trial strategy and that counsel hoped the motion would be granted by the trial court. *Zapata v. State*, 291 Ga. App. 485, 662 S.E.2d 271 (2008).

**Failure to object to comments from court.** — Because O.C.G.A. § 17-8-57 was not violated by the trial court's remarks when giving reasons for a ruling, any objection to that comment by defendant's trial counsel would have been without merit. *Artis v. State*, 299 Ga. App. 287, 682 S.E.2d 375 (2009).

Trial counsel rendered ineffective assistance when counsel failed to object after the state elicited improper testimony and improperly commented on defendant's pre-arrest silence; defendant was entitled to a new trial because the evidence was not overwhelming and the error occurred in direct examination, cross-examination of defendant, and the state's closing argument. *State v. Moore*, 318 Ga. App. 118, 733 S.E.2d 418 (2012).

#### **Strategic decisions.**

Because the way trial counsel chose to handle the trial and present the defendant's defense did not amount to ineffective assistance of counsel, when although counsel elicited prejudicial hearsay, the related questions were based on a strategic decision to attempt to show that the police had very little to link the defendant to the crimes charged, and any damaging hearsay was cumulative of testimony by the defendant's girlfriend, the claim lacked merit. *Allen v. State*, 286 Ga. App. 469, 649 S.E.2d 583 (2007).

While with the benefit of hindsight, it appeared that trial counsel's strategy might have backfired, the circumstances did not support a finding of ineffectiveness; further, because the defendant failed to show a reasonable probability that the result of the trial would have been differ-

ent had counsel done things differently, the defendant's claims failed. *Boyt v. State*, 286 Ga. App. 460, 649 S.E.2d 589 (2007).

Defendant did not show ineffective assistance of counsel where trial counsel had chosen for strategic reasons not to call two jail employees as witnesses, and the defendant's testimony about what the defendant thought the witnesses' testimony might have been was mere speculation and hearsay, which was inadequate to show prejudice. *Felder v. State*, 286 Ga. App. 271, 648 S.E.2d 753 (2007).

The defendant's numerous claims of ineffective assistance of counsel were rejected as the way counsel handled the defense was part of a reasonable trial strategy, even though the defendant claimed that counsel should have: (1) conducted a more in depth voir dire; (2) called the experts who prepared allegedly exculpatory laboratory reports; (3) examined the alibi witnesses about their prior criminal histories; (4) presented evidence to counter the state's evidence of robbery as a motive; and (5) interviewed the defendant's Army friend to determine that a discharge against that individual was dishonorable; even if counsel had undertaken these steps, the outcome would not have changed. *Tolbert v. State*, 282 Ga. 254, 647 S.E.2d 555 (2007).

A trial court did not err by denying a defendant's motion for a new trial as to the defendant's challenge to an aggravated assault conviction based on ineffective assistance of counsel because, even though the defendant called other witnesses who offered some testimony in support of the ineffective assistance of counsel claims, the defendant never called trial counsel, allowing the trial court to properly assume that trial counsel's actions were strategy. *Worthy v. State*, 286 Ga. App. 77, 648 S.E.2d 682 (2007).

A defendant's ineffective assistance of counsel claims failed as photographs showing weapons inside the defendant's house were relevant to issues before the jury and it was part of defense counsel's trial strategy to admit that the defendant grew marijuana and to deny that the defendant was involved in a home invasion. *Medlin v. State*, 285 Ga. App. 709, 647 S.E.2d 392 (2007).

Counsel was not ineffective for presenting an alibi defense when the defendant contended before trial that the defendant was at home when the crime occurred; counsel's decision was a reasonable trial tactic and did not amount to ineffectiveness because the defendant and the defendant's present counsel questioned its efficacy. *Johnson v. State*, 282 Ga. 235, 647 S.E.2d 48 (2007).

The trial court properly denied the defendant a new trial based on numerous claims of ineffective assistance of trial counsel as counsel was not ineffective in failing to: (1) make meritless objections; (2) raise what was considered a novel legal argument; (3) file futile motions that would not have changed the outcome of trial; (4) require corroboration of the defendant's confession; and (5) anticipate that the defendant's wife might mislead the defense; moreover, the defendant's claim that counsel was inadequately prepared for trial was belied by the record. *Daly v. State*, 285 Ga. App. 808, 648 S.E.2d 90 (2007), cert. denied, 2007 Ga. LEXIS 659 (Ga. 2007); 553 U.S. 1039, 128 S. Ct. 2441, 171 L. Ed. 2d 241 (2008).

Because it appeared that trial counsel's strategy was to convince the court that insufficient circumstantial evidence had been presented in order to convict the defendant, and counsel's decision not to hire an expert to testify as to how quickly the defendant could become intoxicated was a tactical matter to avoid getting into a battle of the experts, those decisions did not amount to ineffective assistance of counsel sufficient to warrant a new trial. *O'Connell v. State*, 285 Ga. App. 835, 648 S.E.2d 147 (2007).

The defendant's ineffective assistance of counsel claims lacked merit, as a motion to strike or for a mistrial after the state's expert offered an opinion as to the victim's failure to immediately report the abuse was meritless, and counsel's decision as to how to present the defendant's testimony fell within the realm of reasonable trial strategy, and therefore could not be considered deficient. *Gaines v. State*, 285 Ga. App. 654, 647 S.E.2d 357 (2007).

Because trial counsel's strategic decision not to call a close family friend as a witness, who could have rebutted the

state's evidence that the defendant was controlling, was supported by testimony that the witness would not have added anything to the defense and might have diluted the defendant's voluntary manslaughter theory, counsel was not ineffective in failing have the witness testify. *Johnson v. State*, 282 Ga. 96, 646 S.E.2d 216 (2007).

Because trial counsel did not provide the defendant with ineffective assistance to the extent that the relevant strategic decisions made would not have affected the outcome of the trial, and counsel properly chose not to object to the court's failure to merge a kidnapping and false imprisonment conviction, as they were independent offenses, the defendant's motion for a new trial was properly denied. *Snelson v. State*, 286 Ga. App. 203, 648 S.E.2d 647 (2007).

When trial counsel testified that counsel made a strategic decision not to object to a portion of the prosecutor's closing argument so as to avoid drawing the state's attention to refuting an accident defense, the appellate court would not second-guess counsel's decision. *Hill v. State*, 285 Ga. App. 503, 646 S.E.2d 718 (2007).

A defendant had not shown ineffective assistance of counsel where counsel cited strategic reasons for failing to file a motion to sever offenses, for failing to object to the service of a juror who had a prior first-offender conviction, and for failing to object to identification testimony; counsel's failure to file a motion for a directed verdict based on the sufficiency of the evidence did not prevent the defendant from challenging the sufficiency of the evidence, and certain objections would have been meritless. *Griffith v. State*, 286 Ga. App. 859, 650 S.E.2d 413 (2007).

Trial counsel was not ineffective for not emphasizing that no blood was found in the rooming house where a murder defendant and the victim lived; defense counsel had established the absence of forensic evidence, which would include blood evidence, inside the house, and had emphasized this during closing argument, and it could not be said that counsel was ineffective simply because another attorney might have placed more or a different

emphasis on the evidence. *Jones v. State*, 282 Ga. 306, 647 S.E.2d 576 (2007).

Because trial counsel's decision not to object to statements that might have impugned the defendant's character was a tactical one, the trial court properly found that trial counsel was not ineffective. *Page v. State*, 287 Ga. App. 182, 651 S.E.2d 131 (2007).

In light of trial counsel's reasonable strategy in acquiescing in the trial court's refusal to permit the jury to re-hear the testimony of a witness, trial counsel's performance was not deficient; counsel was concerned that re-reading the testimony would place undue emphasis on it. *Williams v. State*, 282 Ga. 561, 651 S.E.2d 674 (2007).

Trial counsel was not ineffective for having the defendant testify about the defendant's criminal history, as the trial counsel stated that counsel had discussed this issue with the defendant and had decided that the best strategy was to "put everything on the table" to make the defendant seem credible; furthermore, trial counsel was not ineffective for failing to make meritless objections. *Gonzales v. State*, 286 Ga. App. 821, 650 S.E.2d 401 (2007), cert. denied, No. S07C1765, 2008 Ga. LEXIS 70 (Ga. 2008).

A defendant had not shown ineffective assistance of trial counsel when there had been no evidence or testimony of any kind presented to support the ineffective assistance claim; without such evidence, it was presumed that trial counsel's actions were part of trial strategy. *Ingram v. State*, 286 Ga. App. 662, 650 S.E.2d 743 (2007).

Defendant had not shown deficient performance on the part of trial counsel in seeking a continuance; counsel replaced former counsel who was found to have a conflict of interest three days before the scheduled start of defendant's trial, and was immediately faced with a dilemma, to preserve defendant's demand for trial that had been mistakenly filed pursuant to O.C.G.A. § 17-7-170 and be unprepared for the upcoming trial, or waive defendant's demand for trial by seeking a continuance in order to prepare for trial. *Williams v. State*, 282 Ga. 561, 651 S.E.2d 674 (2007).

Because a defendant had not ques-

tioned trial counsel at the hearing on the motion for new trial about counsel's alleged failure to object to certain comments, any decision not to object was presumed to be a strategic one that did not amount to ineffective assistance. *John v. State*, 282 Ga. 792, 653 S.E.2d 435 (2007).

Because counsels' advice against putting the defendant on the stand was tactical, counsel made the strategic decision not to strike a challenged juror, and the record reflected the basis for counsels' objection and motion for a mistrial during the state's closing argument, the defendant's allegations of ineffective assistance of counsel lacked merit; thus, the defendant was not entitled to a new trial as a result. *Warner v. State*, 287 Ga. App. 892, 652 S.E.2d 898 (2007).

Trial counsel's trial tactics and strategy could not form the basis of an ineffective assistance of counsel claim. Moreover, although the defendant initially wanted to accept a plea offer, when the defendant decided to go to trial instead, an ineffective assistance of counsel claim attached to said decision lacked merit, as the defendant failed to show that counsel's advice in this regard was insufficient or erroneous. *Starks v. State*, 283 Ga. 164, 656 S.E.2d 518 (2008).

Trial counsel's decision not to impeach a witness and to develop that witness as a suspect in the murder for which defendant was on trial, as part of the strategy to preserve the right to final argument under O.C.G.A. 17-8-71, did not amount to deficient performance. *Eason v. State*, 283 Ga. 116, 657 S.E.2d 203 (2008).

Defendant did not show that trial counsel was ineffective for not requesting certain charges as these would have been inconsistent with the defendant's "mere presence" defense. Thus, the trial court properly found that this was a strategic decision made in the exercise of reasonable professional judgment. *Whitley v. State*, 293 Ga. App. 605, 667 S.E.2d 447 (2008).

In an aggravated sodomy case, counsel was not ineffective when counsel failed to object to hearsay statements made by the state's witnesses as part of a strategy to bolster the witnesses; when counsel

agreed to exclude any evidence of the victim's criminal history on the ground that counsel believed that the jury would be offended if counsel appeared to be attacking the victim; and when counsel did not request a lesser included offense instruction because counsel believed that the defendant would be convicted on a lesser offense and that counsel's strategy was that the jury would either believe the defense or they would not. *Eller v. State*, 294 Ga. App. 77, 668 S.E.2d 755 (2008).

Trial court did not err by denying a defendant's motion for a new trial based on the defendant's contention that the defendant received ineffective assistance of counsel regarding convictions for aggravated sexual battery and child molestation involving the defendant's eight-year-old child as the trial transcript confirmed that trial counsel attempted to use the allegations that the defendant had abused siblings in the past in an effort to impeach or discredit the young victim on the premises that the young victim received the information from the other parent, which was trial strategy that did not amount to ineffective assistance. *Dyer v. State*, 295 Ga. App. 495, 672 S.E.2d 462 (2009).

Counsel was not ineffective in allowing the defendant to testify about the defendant's criminal history as this was part of counsel's trial strategy to "put everything out there," so that the jury would be convinced the defendant was telling the truth. *Spencer v. State*, 296 Ga. App. 828, 676 S.E.2d 274 (2009).

In a defendant's prosecution for, inter alia, felony murder, defense counsel's opening statement that the defendant would testify to explain why the defendant carried a gun was not ineffective assistance for causing a negative inference when the defendant did not testify as defense counsel used proper strategy in not having the defendant testify after concluding that the state failed to carry the state's burden during trial. *Watkins v. State*, 285 Ga. 107, 674 S.E.2d 275 (2009).

Defendant failed to demonstrate ineffective assistance of counsel in the defendant's prosecution for, inter alia, robbery by force because it was a reasonable strategy to agree to the admission under for-

mer O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609) of a prior 1992 Texas conviction for possession of cocaine, although the conviction was over 10 years old, as the defendant testified on the defendant's own behalf and wanted to put it all out there. *Everett v. State*, 297 Ga. App. 351, 677 S.E.2d 394 (2009).

While defense counsel's cross-examination of an eyewitness elicited a non-responsive statement that might have impugned the defendant's character, counsel was pursuing a reasonable and legitimate trial strategy during counsel's questioning. Since counsel's decision not to object to the statement was a tactical one, counsel did not provide ineffective representation. *Herieia v. State*, 297 Ga. App. 872, 678 S.E.2d 548 (2009).

Decision not to object to the admission of a codefendant's guilty plea could have been the result of reasonable trial strategy; since defendant did not call the defendant's trial counsel to testify at the hearing on the motion for new trial, and in the absence of evidence to the contrary, counsel's decisions were presumed to be strategic and thus insufficient to support an ineffective assistance of counsel claim. In any event, the evidence of the defendant's guilt was overwhelming, there was no reasonable probability the outcome would have been more favorable had counsel done the things defendant claimed that counsel should have, and no prejudice was shown. *Washington v. State*, 285 Ga. 541, 678 S.E.2d 900 (2009).

Defendant did not establish that trial counsel was ineffective for failing to object to testimony of prior investigations of drug activity at the defendant's home. Counsel testified the failure to object was a tactical decision as counsel wanted to highlight the fact that police found only a small quantity of drugs during two of eight investigations; it could not be said that counsel's strategy was unreasonable. *Kessinger v. State*, 298 Ga. App. 479, 680 S.E.2d 546 (2009).

Counsel was not ineffective for failing to object to the state's opening comment that the defendant's story was "ludicrous" and "crazy." Counsel testified that counsel did not object because the statement was not evidence and because objecting could

bring attention to the comments; this was a conscious and deliberate trial strategy. *Raymond v. State*, 298 Ga. App. 549, 680 S.E.2d 598 (2009), cert. denied, No. S09C1791, 2010 Ga. LEXIS 47 (Ga. 2010).

Because trial counsel's strategic decision to basically admit the conduct underlying the allegations against defendant and to argue that defendant's actions amounted at most to lesser-included offenses was eminently reasonable, the trial court did not err in denying defendant's claim of ineffective assistance of counsel. *Biggins v. State*, 299 Ga. App. 554, 683 S.E.2d 96 (2009).

Trial court did not err by denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because the defendant's claims of ineffectiveness were basically unsubstantiated conclusions when many of the instances of alleged deficient performance, such as the alleged failure to properly or "ardently" examine witnesses, failure to make certain objections, failure to elicit certain testimony, and the failure to request certain charges fell under the heading of trial strategy and generally would not support a claim for ineffective assistance of counsel; although the defendant contended that counsel failed to pursue a motion to suppress on fingerprint evidence, the defendant made no attempt to show that the motion would have been successful. *Moore v. State*, 301 Ga. App. 220, 687 S.E.2d 259 (2009), cert. denied, No. S10C0544, 2010 Ga. LEXIS 333 (Ga. 2010).

Defendant failed to meet defendant's burden of showing deficient performance and prejudice from trial counsel's actions because trial counsel's decisions to not give an opening statement and to not cross-examine the state's witnesses were reasonable trial strategies and did not amount to ineffective assistance; at the hearing on the defendant's motion for new trial, counsel testified that counsel made a strategic decision not to give an opening statement in order to "leave the door open" for counsel to pursue whatever strategy would turn out to be the most advantageous for the defendant after hearing the evidence that the state would present, and the defendant failed to show what favorable evidence could have been

elicited from the witnesses who were not cross-examined by defendant's trial attorney. *Lawrence v. State*, 286 Ga. 533, 690 S.E.2d 801 (2010).

Trial counsel was not ineffective by eliciting testimony from the defendant that the defendant met a confidential informant while in jail, by questioning the defendant about the circumstances surrounding defendant's arrest on a prior charge, and by asking the defendant when the defendant got out of jail on that charge because trial counsel testified that counsel made a strategic decision to ask questions pertaining to the defendant's stint in jail on the prior charge based upon representations the defendant made during their pre-trial meetings together, and trial counsel made the tactical decision to have the defendant testify that the defendant had once shared a jail cell with the informant and had witnessed the informant hurt other inmates on several occasions and that any negative effects of explaining to the jury why the defendant had been in jail would be outweighed by the overall positive effects of the jail-related testimony on defendant's entrapment defense; trial counsel was not required to anticipate that the defendant would mislead counsel about the prior charge, and because the questions posed by counsel on direct examination were based upon the misleading information supplied by the defendant, any resulting prejudice was attributable to the defendant, not to the ineffectiveness of defendant's trial counsel. *Martinez v. State*, 303 Ga. App. 166, 692 S.E.2d 766 (2010).

Defendant, who was convicted of aggravated assault and aggravated battery, was not denied effective assistance of counsel because it was reasonable trial strategy to not seek a jury charge on accident, particularly as the facts did not warrant such an instruction, and to not object to admission of prior acts testimony, particularly as the overwhelming evidence of guilt made it unlikely that the evidence contributed to the verdict. *Arnold v. State*, 303 Ga. App. 825, 695 S.E.2d 299 (2010).

Defendant could not prove that defendant received ineffective assistance because defendant's trial counsel made a reasonable strategic decision not to pur-

sue a medical defense or present expert testimony on the issue; trial counsel made an informed decision not to pursue the medical defense through expert testimony based upon the representations made to counsel by the defendant over the course of several client interviews and in light of counsel's assessment that a jury would be unlikely to view the defense as plausible, and the effectiveness of trial counsel's strategic decision to defend on the alternative ground that the defendant did not commit the alleged criminal acts was demonstrated by the fact that the jury acquitted the defendant of several of the charged offenses. *Coats v. State*, 303 Ga. App. 818, 695 S.E.2d 285 (2010).

Trial counsel did not place the defendant's character in issue by conceding the defendant's guilt of aggravated assault because the concession related to the facts alleged and crimes charged in the case, not to other transactions reflective of the defendant's character; given that numerous witnesses testified that the defendant had a bat on the night in question and struck the victim in the head with the bat while only one witness testified that the defendant took the victim's wallet out of victim's pocket, trial counsel's strategy of contesting only the armed robbery count was reasonable and not ineffective. *Taylor v. State*, 304 Ga. App. 395, 696 S.E.2d 686 (2010).

Defendant could not establish that defendant's trial counsel was ineffective for failing to object or move for a mistrial after the prosecutor cross-examined the defendant about whether the defendant had been previously arrested for driving under the influence or had been dishonorably discharged from the military because trial counsel's decision not to object or move for a mistrial was a reasonable trial strategy; defense counsel made the strategic decision to wait until closing argument to respond to the prosecutor's questions, and counsel's strategic decision was not patently unreasonable. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Trial counsel did not impugn the defendant's character during opening statement because counsel testified that counsel made the statement in anticipation of the state introducing similar transaction

evidence; counsel's decision to address the problem of similar transaction testimony in counsel's opening statement was clearly strategic. *Sheats v. State*, 305 Ga. App. 475, 699 S.E.2d 798 (2010).

Trial counsel was not ineffective for asking for a charge on a lesser-included offense because the trial court's finding that counsel discussed the strategy of seeking a charge on the lesser-included offense with the defendant, who did not oppose the charge, was supported by the record and was not clearly erroneous; therefore, the court of appeals had to accept the charge. *Sheats v. State*, 305 Ga. App. 475, 699 S.E.2d 798 (2010).

Defendant did not receive ineffective assistance of counsel when defendant's trial counsel failed to object to testimony by the victim's parent that placed the defendant's character in issue because counsel made a reasonable strategic decision not to object to the parent's passing reference to the defendant as "bad news" and the parent's testimony that the parent had seen the defendant "at the jail" where the parent worked; counsel wanted the jury to see that the parent hated the defendant and believed that the parent's testimony would show that the parent was simply biased against the defendant. *Jennings v. State*, 288 Ga. 120, 702 S.E.2d 151 (2010).

Trial counsel did not render ineffective assistance by failing to obtain the victim's mobile telephone records because counsel's investigator contacted the defendant's mobile telephone provider to determine if the defendant and the victim had called each other on the night of the incident but was told that the relevant records were destroyed after six months; trial counsel testified that while counsel was aware from the beginning that the defendant claimed defendant's encounter with the victim was consensual, after several discussions on trial strategy, counsel and the defendant agreed to pursue a defense that focused on the victim's inability to positively identify the defendant as the victim's attacker. *Mattox v. State*, 305 Ga. App. 600, 699 S.E.2d 887 (2010).

Trial court did not err in denying the defendant's motion for new trial on the basis of ineffective assistance of counsel

because trial counsel's defense strategy of implicating the codefendants was not unreasonable, and counsel did not fail to present evidence as promised in counsel's opening statement; the jury heard at least a portion of the promised evidence, and the defendant could not show that there was a reasonable probability that the outcome of the trial would have been different had counsel opened differently. *Jackson v. State*, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

There was no merit to the defendant's claim that the defendant received ineffective assistance of counsel on the ground that defendant's trial attorney failed to learn Georgia law on child molestation and did not know that the Georgia rape shield statute did not apply to child molestation and sexual battery cases based upon trial counsel's testimony to the contrary during the motion for new trial hearing because to the extent the defendant argued that the alleged lack of knowledge precluded a defense based upon an alleged sexual relationship between the victim and the defendant's son, trial counsel testified that counsel actually considered and rejected that defense as a matter of trial strategy; even though counsel decided to advocate a different defense, counsel still brought out some evidence from which a jury could infer that such a relationship existed. *Wade v. State*, 305 Ga. App. 382, 700 S.E.2d 827 (2010), cert. denied, U.S. , 131 S. Ct. 3066, 180 L. Ed. 2d 893 (2011).

Trial counsel was not ineffective for entering into a stipulation with the state regarding the admissibility, accuracy, and voluntariness of a polygraph examination because stipulating to the admission of polygraph test results was a valid trial strategy, and there was evidence the ramifications were explained to the defendant; trial counsel discussed the polygraph examination with the defendant on multiple occasions, and trial counsel ultimately agreed that the defendant would submit to an examination because counsel found the defendant exceedingly credible. Furthermore, trial counsel was not ineffective for failing to file a motion to sever the defendant's case from that of a codefendant because trial counsel testified that

counsel made the strategic decision not to move to sever the trials because counsel wanted to support the argument that polygraph examinations were unreliable by presenting evidence that the codefendant passed a polygraph examination even though more physical evidence linked the codefendant to the crime scene; an informed strategic decision concerning severance did not amount to ineffective assistance of counsel. *Harris v. State*, 308 Ga. App. 523, 707 S.E.2d 908 (2011).

During defendant's trial for aggravated stalking and criminal trespass, trial counsel was not ineffective for failing to introduce evidence of a hotel receipt or for failing to object to an improper question impeaching a defense witness; trial counsel's decision to focus on defendant's alibi witness was a matter of trial strategy which was not patently unreasonable. *Reed v. State*, 309 Ga. App. 183, 709 S.E.2d 847 (2011).

Defendant's claim that trial counsel's failure to preserve an issue constituted ineffective assistance of counsel was without merit because trial counsel's testimony showed that counsel pursued the reasonable strategy, however mistaken it could appear with hindsight, of placing the damaging information before the jury through the defendant's direct testimony, rather than risk having the information extracted from the defendant on cross-examination. *Collier v. State*, 288 Ga. 756, 707 S.E.2d 102 (2011).

Trial counsel was not ineffective for failing to move for a mistrial when a state's witness interjected bad character evidence because trial counsel explained that counsel did not move for a mistrial as a matter of trial strategy since counsel did not believe that a mistrial was warranted and did not want to draw further attention to the objectionable facts; trial counsel's strategy in that regard was not unreasonable. *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

Defendant failed to show ineffective assistance of counsel because the defendant, in view of the strength of the evidence implicating the defendant in the shootings of the two victims, failed to show that trial counsel's choice of strategies was unreasonable, and, thus, ineffective. The fact

that the defendant, in hindsight, questioned the efficacy of the chosen defense strategy did not establish ineffective assistance. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

Defendant could not overcome the strong presumption that trial counsel rendered effective assistance because trial counsel's closing argument was a trial strategy to convince the jury that the evidence the state proffered was insufficient to prove the crimes with which the defendant was charged; trial counsel's argument, aimed at requesting an acquittal on the charged offenses, was a reasonable trial strategy. *Daniels v. State*, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Trial counsel's decision to argue that DNA evidence were indicia of the victim's consensual relationship with the defendant rather than directly challenging the state's expert witness or deny it was the defendant's blood or saliva was an objectively reasonably trial strategy and, thus, did not support a finding that trial counsel rendered ineffective assistance. *Simpson v. State*, 289 Ga. 685, 715 S.E.2d 142 (2011).

Defendant did not meet the burden under *Strickland* of showing that defense counsel's performance was deficient for pursuing the trial strategy of showing a video of the defendant's earlier arrest for driving under the influence because defense counsel testified that the theory of the case was to show through the video that the same two officers stopped the defendant both times and that the officers were targeting the defendant; counsel pursued a strategy that resulted in the defendant being acquitted of four of the six charges against the defendant. *Sledge v. State*, 312 Ga. App. 97, 717 S.E.2d 682 (2011).

Defendant did not show ineffective assistance of counsel based upon counsel's strategy choices regarding the scope of cross-examination of two witnesses. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Defendant was unable to demonstrate that trial counsel rendered deficient performance by switching trial strategy based upon the evidentiary rulings of the trial court because trial counsel's strategic

decisions were not so patently unreasonable that no competent attorney would have chosen those decisions. *Ledford v. State*, 313 Ga. App. 389, 721 S.E.2d 585 (2011).

Trial court did not err when the court denied the portion of the codefendant's motion for new trial alleging ineffective assistance of trial counsel because the alleged deficiencies in trial counsel's performance were either without factual basis or were decisions made as matters of trial strategy; trial counsel did not speak with the deputy medical examiner who performed the autopsy before trial because the autopsy report was favorable to the codefendant's version of events, and trial counsel testified counsel did not ask for a jury instruction on voluntary manslaughter because it would have required an admission that the codefendant had committed an unlawful act. *Smith v. State*, 290 Ga. 428, 721 S.E.2d 892 (2012).

Trial counsel's revealing that defendant had recently been released from prison on a separate offense did not constitute ineffective assistance of counsel in defendant's child molestation trial as it was a strategy used in an attempt to show that the child's parent fabricated the molestation incident in an effort to return the defendant to prison. *Bentley v. State*, 314 Ga. App. 599, 724 S.E.2d 890 (2012).

Trial counsel was not ineffective for failing to object to the prosecutor's remarks about the defendant because counsel employed a reasonable strategy in an effort to minimize the potential effect of the similar transaction evidence that had been admitted at trial; therefore, counsel's decision not to object to the state's further comment on the defendant was reasonable as well. *Wheeler v. State*, 290 Ga. 817, 725 S.E.2d 580 (2012).

Trial counsel was not ineffective for failing to object to a paramedic's testimony that the paramedic thought a domestic situation occurred because the defendant did not show that trial counsel's tactical decision not to object to the testimony was outside the range of reasonably effective assistance; trial counsel testified that counsel did not object because there was no doubt that a domestic dispute had occurred. *Brockington v. State*, 316 Ga. App. 90, 728 S.E.2d 753 (2012).

Trial counsel was not deficient for failing to present evidence showing that a company breached the company's contract with the defendant because the defendant failed to show that trial counsel's actions were not strategic; even if trial counsel performed deficiently, the defendant could not establish that the defendant was prejudiced by counsel's performance. *Bearden v. State*, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

Defendant's trial attorney was not deficient in failing to present a defense based on agency, in connection with the charge against the defendant of false statement or writing regarding a building permit application by defendant for homeowners, because the defendant failed to establish a reasonable probability that the outcome of the trial would have been different if the trial attorney had raised such a defense. *Wilson v. State*, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

**Failure to follow same defense strategy as prior counsel.** — Eliciting evidence of defendant's prior convictions from defendant on direct examination instead of risking having the information extracted on cross-examination was a reasonable strategy. *Wilson v. State*, 291 Ga. App. 69, 661 S.E.2d 221 (2008).

Because defendant had not proffered the necessary evidence, defendant had not shown prejudice from counsel's tactical decision not to except to a ruling on refreshing recollection with a police report. *Wilson v. State*, 291 Ga. App. 69, 661 S.E.2d 221 (2008).

With regard to defendant's conviction for armed robbery and other crimes, the trial court did not err in denying defendant's motion for new trial when the court found that defendant did not carry the burden of showing ineffective assistance based on defense counsel failing to object to the introduction into evidence of the guilty plea of the gunman/co-indictee and further failed to request a limiting instruction thereon as the evidence supported the trial court's findings that those decisions were strategic and not patently unreasonable. Trial counsel testified at the motion for a new trial hearing that the guilty plea of the gunman was important to the defense strategy of placing all the

blame on the gunman as well as showing the jury that defendant would serve a lengthy sentence if the jury found the defendant guilty. *Sillah v. State*, 291 Ga. App. 848, 663 S.E.2d 274 (2008).

With regard to a defendant's convictions for malice murder and other crimes, the defendant failed to demonstrate that trial counsel's decision to forego an insanity or delusional compulsion defense, instead of pursuing the same as prior trial counsel had intended, was unreasonable as the evidence showed that defendant and trial counsel collectively agreed that the success of raising such a defense was highly unlikely. Further, the fact that trial counsel would have pursued a different strategy than the defendant's prior counsel did not render trial counsel's strategy unreasonable. *Martinez v. State*, 284 Ga. 138, 663 S.E.2d 675 (2008).

With regard to defendant's conviction for distributing cocaine, the defendant failed to establish that the defendant was rendered ineffective assistance of counsel based on defense counsel failing to object to the admission of a recorded conversation between defendant and a confidential informant on Sixth Amendment/right to confrontation grounds as even if the recorded conversation was objectionable as a violation of defendant's constitutional rights under the confrontation clause, trial counsel testified to various strategic reasons for keeping the confidential informant out of the courtroom at the hearing on defendant's motion for a new trial. As such, since that strategy was not patently unreasonable, the trial court did not err in finding that trial counsel's actions in that regard fell within the broad range of reasonable professional conduct. *Beck v. State*, 292 Ga. App. 472, 665 S.E.2d 701 (2008), cert. denied, No. S08C1863, 2008 Ga. LEXIS 922 (Ga. 2008).

Counsel was not ineffective for not seeking to exclude or redact portions of a defendant's profanity-ridden recorded statement. Counsel's decision not to object to the statement's admissibility was clearly strategic as counsel believed that the statement fit into the alibi defense and because counsel thought the profanity made the statement a more powerful denial. *Smashum v. State*, 293 Ga. App. 41,

666 S.E.2d 549 (2008), cert. denied, 2008 Ga. LEXIS 952 (Ga. 2008).

#### **Futile objections.**

Because the trial judge did not err in admonishing the victim to tell the truth, outside the presence of the jury, or by propounding a single question to the victim in the presence of the jury in order to develop the truth of the case, trial counsel was not ineffective in failing to object to either action, as the objection would have lacked merit. *Morales v. State*, 286 Ga. App. 698, 649 S.E.2d 873 (2007).

In a child molestation case, trial counsel was not ineffective for not objecting when a child advocate and a grandmother of the victim testified that they had told the victim to tell the truth; the statements were not improper bolstering because they did not constitute an opinion as to whether the victim was in fact telling the truth. *Slade v. State*, 287 Ga. App. 34, 651 S.E.2d 352 (2007), cert. denied, 129 S. Ct. 56, 172 L.Ed.2d 24 (2008).

The defendant's trial counsel could not be found to have rendered ineffective assistance in not objecting to the court's admonishment of the victim to tell the truth or the court's subsequent questioning of the victim, as the appeals court found that both actions by the trial court were proper; hence, any objection would have lacked merit. *Morales v. State*, 286 Ga. App. 698, 649 S.E.2d 873 (2007).

Counsel was not ineffective for not objecting to evidence that a bloodhound had tracked a human scent, as the evidence was admissible without a showing that such tracking had reached a scientific stage of verifiable certainty, or for not objecting to expert testimony, as the expert had not made an impermissible comment on the ultimate issue in the case but merely posited a connection between two crimes. *Bass v. State*, 288 Ga. App. 690, 655 S.E.2d 303 (2007), rev'd on other grounds, 2009 Ga. LEXIS 31 (Ga. 2009).

Defendant did not carry the burden of demonstrating ineffective assistance of counsel because trial counsel did not perform deficiently by failing to make a meritless objection to the trial court's allegedly erroneous decisions regarding merger of offenses and prosecutorial misconduct; neither of those decisions were in

error. *Chandler v. State*, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Defendant failed to show ineffective assistance of counsel from the defendant's trial counsel having failed to object to the absence of a charge instructing jurors that to convict the defendant of felony murder the jurors were to specifically find the underlying felony had some connection with the homicide. Inasmuch as the jury found the defendant guilty of malice murder and no conviction was entered on the felony murder charge, this enumeration of error was moot. *Darville v. State*, 289 Ga. 698, 715 S.E.2d 110 (2011).

#### **Failure to object to closing argument.**

In a prosecution for child molestation involving a 12-year-old victim, evidence was properly admitted that the defendant also had sexual intercourse with a 15-year-old child. Defense counsel was not ineffective for failing to object to the prosecutor's comment during closing argument that the defendant liked to perform sex acts on children as this was a fair comment on the evidence, and any objection would have been overruled. *Martin v. State*, 294 Ga. App. 117, 668 S.E.2d 549 (2008).

As the interpretation of former O.C.G.A. § 24-3-36 (see now O.C.G.A. § 24-8-801) in *Mallory v. State*, 409 S.E.2d 839 (1991), had only prospective application, it did not apply to the defendant's case, which was tried before *Mallory* was decided. Therefore, defense counsel's strategic decision not to object to the prosecutor's comment on the defendant's request for counsel was not prejudicial as a matter of law; in view of the overwhelming evidence of the defendant's guilt, the defendant did not establish a violation of the right to the effective assistance of counsel. *Patterson v. State*, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010).

Even assuming that the prosecutor's request that the jury not turn the defendant loose on the streets was an improper comment on the defendant's future dangerousness, and that defense counsel's failure to object constituted deficient performance, in light of evidence that the

defendant confessed to a murder to an accomplice, a cellmate, and an officer, the assumed deficient performance created little, if any, actual prejudice. *Patterson v. State*, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010).

In a prosecution for possession of controlled substances, defense counsel did not object to statements by the codefendant's counsel in closing argument regarding the multiple drug-related investigations of the defendant. As the argument was based on evidence produced at trial, an objection would not have been meritorious; therefore, the defendant's trial counsel was not ineffective. *Kessinger v. State*, 298 Ga. App. 479, 680 S.E.2d 546 (2009).

Trial counsel did not render ineffective assistance by failing to object to comments made during the state's closing argument in which the prosecutor conveyed the prosecutor's personal assessment of the evidence because the evidence against the defendant was overwhelming, and in light of the evidence, the defendant did not show that had trial counsel objected to the state's closing argument, there was a reasonable probability that the outcome of defendant's trial would be different. *Bridges v. State*, 286 Ga. 535, 690 S.E.2d 136 (2010).

Trial counsel was not ineffective for failing to object and/or to move for a mistrial due to a statement the assistant district attorney made during closing argument because the defendant did not demonstrate that any statement by the prosecution was not a reasonable inference from the evidence; the defendant did not show that but for a lack of objection or moving for a mistrial, there was the reasonable probability that the outcome of the defendant's trial would have been different. *Sanford v. State*, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, U.S. , 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011).

Trial counsel was ineffective for failing to object to the prosecutor's characterization of the defendant as a "thug" during closing argument because the prosecution was afforded wide latitude in closing argument, and the characterization was

based on reasonable inferences drawn from the evidence. *Dockery v. State*, 287 Ga. 275, 695 S.E.2d 599 (2010).

Defendant did not receive ineffective assistance of trial counsel because even assuming that counsel performed deficiently in failing to object to the prosecutor's argument, despite counsel's explanation of the strategy, the defendant failed to carry the defendant's burden to show prejudice since the trial court instructed the jury that closing arguments were not evidence and that it was the jury's responsibility to decide the case based on the evidence introduced in court, which would exclude what the jury could have heard on television. Because the evidence against the defendant was strong, even if counsel had objected to the argument and the trial court had sustained the objection and instructed the jurors specifically not to rely on what the jurors had heard on television, there was no reasonable probability that the result of the trial would have been different. *Long v. State*, 287 Ga. 886, 700 S.E.2d 399 (2010).

Trial counsel did not provide deficient performance in failing to object to the prosecutor's remarks during closing argument because the remarks did not constitute an improper comment on the defendant's failure to testify since the state's manifest intention was not to comment on the defendant's silence to the police or failure to testify at trial but to comment on the defendant's failure to assert the defendant's innocence in response to a request by an acquaintance for the defendant to go to the police; taken in context, the prosecutor's closing argument did not directly or naturally implicate the defendant's decision not to testify, but the prosecutor was simply making a reasonable inference based on previous testimony. *Cannon v. State*, 288 Ga. 225, 702 S.E.2d 845 (2010).

Trial court's finding that the defendant did not receive effective assistance of counsel was not clearly erroneous because trial counsel's failure to object to the prosecutor's permissible closing argument could not serve as the basis for an ineffective assistance claim; the prosecutor was not offering the prosecutor's personal belief about the veracity of a state witness,

but instead was arguing that, based on the evidence presented and the reasonable inferences drawn therefrom, the jury could conclude that the witness was telling the truth, and when read in context, the prosecutor's statements to the jury that the witness was telling you the truth were suggestions to the jury of inferences the jury could draw from the evidence presented and were made in response to trial counsel's attack on the witness's credibility during cross-examination. *Herndon v. State*, 309 Ga. App. 403, 710 S.E.2d 607 (2011).

Defendant's counsel did not render ineffective assistance by failing to object to certain remarks made by the prosecutor during closing argument because the prosecutor's argument that the victim could not have been lying due to the level of detail in the victim's testimony merely urged the jury to make a deduction about the victim's veracity based upon the evidence adduced at trial; the remarks did not constitute a statement of the prosecutor's personal belief as to the victim's veracity, and any objection thereto would have been meritless. *Jackson v. State*, 309 Ga. App. 450, 710 S.E.2d 649 (2011).

Trial counsel's failure to object to the prosecutor's comments during closing argument did not constitute deficient performance because the comments of which defendant complained were permissible; the comments were the conclusion the prosecutor wished the jury to draw from the evidence and not a statement of the prosecutor's personal belief as to the veracity of a witness. *Strickland v. State*, 311 Ga. App. 400, 715 S.E.2d 798 (2011).

Defendant failed to show that trial counsel was ineffective for failing to object to the prosecutor's improper argument because even assuming that an objection to the offending argument would have had merit, the defendant did not show a reasonable probability that the outcome of the trial would have been different had counsel made the objection. *Jeffers v. State*, 290 Ga. 311, 721 S.E.2d 86 (2012).

Trial counsel was not ineffective for failing to object during closing arguments when the state commented on the defendant's right to remain silent and failure to come forward because the prosecutor did

not act inappropriately; the defendant initially placed the evidence before the jury that the defendant fled and did not go to police after the shooting. *Kendrick v. State*, 290 Ga. 873, 725 S.E.2d 296 (2012).

Trial counsel was not ineffective for failing to object to the state's argument that no person in the circuit had ever been convicted and later proven innocent because the trial court would not have abused the court's discretion in denying the defendant's motion for mistrial had one been made and did not err when the court credited trial counsel's defense of counsel's decision not to object to the prosecutor's closing argument as strategic; even assuming that the prosecutor should not have compared the defendant to others, the subject of wrongful convictions in other cases was brought up by the defendant, and the jury was not impressed either way by the colloquy. *Stubbs v. State*, 315 Ga. App. 482, 727 S.E.2d 229 (2012).

Trial counsel was not ineffective for failing to object to the prosecutor's closing arguments because evidence supported the trial court's determination that no improper comments were made during the state's closing argument. *Davenport v. State*, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

#### **Time for closing argument.**

Although defense counsel did not object when counsel's closing argument was limited to one hour, even though the kidnapping charge permitted two hours, defendant failed to show prejudice necessary for an ineffective assistance of counsel claim because there was no reasonable possibility of an acquittal even if counsel had demanded two hours of closing argument due to the lack of complex issues, the fact that defendant admitted to most of the charges, and counsel addressed all pertinent issues in counsel's closing argument. *Hammond v. State*, 303 Ga. App. 176, 692 S.E.2d 760 (2010), *aff'd*, 289 Ga. 142, 710 S.E.2d 124 (2011).

#### **Questioning of jurors.**

Assuming defense counsel's performance was deficient during defendant's trial for aggravated assault and criminal trespass for failing to object to the trial court's failure to ask the qualifying voir

dire questions that are required by O.C.G.A. § 15-12-164(a), defendant failed to show that the outcome of the trial would have been different had the trial court asked the statutory questions as the prosecutor asked the potential jurors whether they were acquainted with the defendant or the victim, and if so, whether they could remain impartial. Since the potential jurors indicated no bias and defendant did not contend that any juror was, in fact, biased or prejudiced, defendant failed to show ineffective assistance of trial counsel. *Burnette v. State*, 291 Ga. App. 504, 662 S.E.2d 272 (2008).

Defendant failed to demonstrate that the defendant was deprived of effective assistance of counsel because although the defendant argued that the defendant's trial counsel failed to ask prospective jurors certain questions during voir dire, the defendant made no assertion as to what answers any prospective juror would have given had he or she been asked any of those questions or as to what significance any such answer would have had; because the record also did not show that any other prospective jurors were erroneously qualified or disqualified due to any actions that the trial counsel took or failed to take, no prejudice could be assigned to the alleged error by trial counsel. *Ware v. State*, 307 Ga. App. 782, 706 S.E.2d 143 (2011).

Defendant's claim that the defendant's trial counsel rendered ineffective assistance by failing to request that the trial court examine the remaining jurors whether the jurors had been affected by a juror after the juror had been removed was unsupported, and the defendant could not show prejudice or harm because there was no error on which to premise the claim of ineffective assistance; the defendant did not request that the trial court question the remaining jurors, and the juror's responses clearly indicated that the juror's statement to the other jurors about the juror's conflict was exceedingly minimal and that the others had no reaction to the statement. *Sharpe v. State*, 288 Ga. 565, 707 S.E.2d 338 (2011).

When the defendant was on trial for murdering a girlfriend, as defense counsel

decided not to further question a prospective juror, who had strong feelings about domestic violence, in order to avoid tainting the remaining jurors, this was a reasonable strategic decision that did not constitute ineffective assistance. *Cade v. State*, 289 Ga. 805, 716 S.E.2d 196 (2011).

**Failure to challenge jury array.**

As defense counsel testified that counsel believed the state's race-neutral reasons for striking African-Americans during voir dire, and as the jury panel comprised 10 white members and two African-American members, counsel was not ineffective for not raising a Batson challenge. *Crawford v. State*, 294 Ga. App. 711, 670 S.E.2d 185 (2008).

Because defendant waived any objection regarding an unsummoned juror, and because evidence supported the trial court's finding that the state's reasons for striking the challenged jurors were race-neutral, defendant did not show that counsel's failure to object constituted ineffective assistance. *Allen v. State*, 299 Ga. App. 201, 683 S.E.2d 343 (2009).

Trial counsel did not render ineffective assistance by failing to raise a Batson challenge because the defendant failed to show that a Batson challenge would have been successful since the defendant neither called the state's prosecutors to testify at the motion for new trial hearing nor sought out or attempted to introduce their notes regarding the striking of jurors prior to trial; only the state attempted to elicit that information during the state's cross-examination of trial counsel, and the resulting testimony indicated that the state did have race-neutral reasons for using the state's peremptory strikes. *Stokes v. State*, 289 Ga. 702, 715 S.E.2d 81 (2011).

**Failure to object to juror.**

Defendant did not overcome the strong presumption that trial counsel's failure to seek a juror's removal for cause constituted reasonable professional assistance because the defendant did not question trial counsel at the motion for new trial hearing about counsel's decision-making with regard to this issue, and the trial transcript showed that the juror did not meet the qualification for dismissal for cause. *Higginbotham v. State*, 287 Ga. 187, 695 S.E.2d 210 (2010).

Trial counsel was not ineffective in failing to move to strike three prospective jurors for cause, all of whom said the jurors had strong feelings about individuals involved in the sale of illegal drugs, because the jurors all indicated the jurors could try to judge the case based upon the court's instructions and the evidence. *Ellis v. State*, 292 Ga. 276, 736 S.E.2d 412 (2013).

**Failure to object to limitation on voir dire.** — Trial counsel was not ineffective for failing to object to limitations on voir dire because the defendant was nevertheless able to adequately explore any inclination or bias that might have derived from strong feelings that prospective jurors had about individuals involved in the sale of illegal drugs. *Ellis v. State*, 292 Ga. 276, 736 S.E.2d 412 (2013).

**Failure to ensure defendant's presence at in-chamber hearing on juror removal.** — With regard to a defendant's conviction for malice murder, the trial court properly denied the defendant's motion for a new trial based on a claim that trial counsel was ineffective for failing to object to a juror remaining on the panel after a brief encounter with one of the state's witnesses and the failure to insist that defendant be allowed to personally participate in the in-chambers hearing on the issue. The decision to allow the juror to remain on the panel was a reasonable tactical decision made after a hearing was held on the issue and no harm was established by the defendant not being present during the in-chambers hearing on the issue as a result of the overwhelming evidence of the defendant's guilt. *Peterson v. State*, 284 Ga. 275, 663 S.E.2d 164 (2008).

**Failure to allow defendant's "participation" in voir dire.** — The defendant had not shown ineffective assistance of counsel based on the defendant's claim that the defendant was not allowed to participate in jury selection. Trial counsel testified that the defendant was present during voir dire and that counsel and the defendant did have some discussion about prospective jurors; moreover, the defendant did not suggest how jury selection would have been different if the defendant had participated. *Daugherty v. State*, 291

Ga. App. 541, 662 S.E.2d 318 (2008), cert. denied, 2008 Ga. LEXIS 792 (Ga. 2008).

**Failure to poll jury.** — Because the failure to timely request a jury poll did not amount to deficient performance and trial counsel's preparation was not deficient or prejudicial, the appeals court rejected the defendant's ineffective assistance of counsel claims. *Hodge v. State*, 287 Ga. App. 750, 652 S.E.2d 634 (2007).

A jury sent a question to the trial court, but before it could respond, the jury reached a verdict. The defendant's trial counsel was not ineffective for not demanding that the jury be polled; moreover, the defendant failed to show it was reasonably probable that had the jury been polled, a problem with the verdict would have become apparent. *Soloman v. State*, 294 Ga. App. 520, 669 S.E.2d 430 (2008).

Trial counsel was not ineffective for failing to conduct a poll of the jury because the defendant cited no authority to support the position that a poll of the jury was required under the circumstances to provide effective representation. *Bonner v. State*, 308 Ga. App. 827, 709 S.E.2d 358 (2011).

**Failure to request voir dire transcription.**

Because convictions did not merge, trial counsel was not ineffective for not objecting to the trial court's failure to merge them. *Smashum v. State*, 293 Ga. App. 41, 666 S.E.2d 549 (2008), cert. denied, 2008 Ga. LEXIS 952 (Ga. 2008).

Trial counsel was not ineffective for failing to have voir dire taken down by a court reporter because the defendant did not show prejudice since the defendant failed to establish that a Batson violation, or any other irregularity, occurred and the record revealed no dispute at trial about the questioning and responses with respect to a juror; trial counsel testified that even though voir dire was not officially recorded, the co-counsel's primary duty was to take notes throughout trial, including voir dire, and that all the notes and other legal work by defense counsel on the case were turned over to the appellate counsel. *Hunt v. State*, 288 Ga. 794, 708 S.E.2d 357 (2011).

**Charge requested by defendant properly given.** — As a charge on volun-

tary manslaughter was justified, trial counsel was not ineffective for requesting it; furthermore, trial counsel was not ineffective for not making meritless objections. *Hayles v. State*, 287 Ga. App. 601, 651 S.E.2d 860 (2007).

**Failure to request jury instruction on accomplice testimony.** — Trial counsel was not ineffective for failing to request a jury instruction on the requirement for corroboration of accomplice testimony because the evidence did not require such an instruction given that there was other evidence corroborating the incriminating testimony from the accomplice. *Brown v. State*, No. A12A2308, 2013 Ga. App. LEXIS 228 (Mar. 20, 2013).

**Failure to request jury charge in writing.** — In a defendant's prosecution for, inter alia, armed robbery, trial counsel was not ineffective because although counsel failed to file written jury charge requests on the lesser included crimes of false imprisonment and theft, those requests were made orally and were considered on the merits. *Wesley v. State*, 294 Ga. App. 559, 669 S.E.2d 511 (2008).

**Failure to object to proper jury instruction.** — In a defendant's prosecution for malice murder, trial counsel was not ineffective for requesting a jury instruction that was allegedly contrary to the defense strategy of convincing the jury that there was insufficient corroboration of the defendant's statement because the jury instruction was virtually identical to the standard instruction and actually supported the defense theory; at any rate, the state requested the exact same jury instruction. *Hill v. State*, 284 Ga. 521, 668 S.E.2d 673 (2008).

Defense counsel was not ineffective for failing to object to an instruction that if the jury found the defendant was not guilty of armed robbery, the jury could not find the defendant guilty of possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b). As the commission of the underlying felony was an essential element of § 16-11-106(b), the instruction was a correct statement of the law. *Soloman v. State*, 294 Ga. App. 520, 669 S.E.2d 430 (2008).

Defendant's trial counsel was not ineffective for failing to object to the trial

court's instruction regarding the charge of possession of a firearm during the commission of a crime because the defendant did not point to any jury charge that was objectionable or any jury charge that should have been given but was not. *Smith v. State*, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

Defendant was not denied effective assistance of trial counsel due to counsel's failure to object to an allegedly sequential jury instruction and to attempt to exclude an allegedly prejudicial charge on adultery because the trial court's charge was not improperly sequential, and counsel could not be considered professionally deficient for failing to object to the charge; the charge on adultery did not prevent the jurors from considering adultery as provocation for a verdict of voluntary manslaughter because the trial court specifically charged the jury that the jury could consider voluntary manslaughter if it was shown by the evidence that the killing was done by the defendant without malice and not in the spirit of revenge but under a violent, sudden impulse of passion created in the mind of the defendant by ongoing adultery or recent discovery of past adultery. *Loadholt v. State*, 286 Ga. 402, 687 S.E.2d 824 (2010).

Trial court did not err in finding that trial counsel was not deficient in failing to object to a pre-trial instruction that was given to the jury pool because the pre-trial instruction was proper, and trial counsel found the instruction advantageous; the pre-trial charge, as a whole, did not shift the burden of proof to the defendant, and one of the defendant's trial counsel testified that counsel believed that the defendant actually benefitted from the instruction because the instruction sounded as if the instruction was in defendant's favor and that the giving of the instruction aided the defendant in effectively questioning the jurors regarding their viewpoints on the law during voir dire. *Bridges v. State*, 286 Ga. 535, 690 S.E.2d 136 (2010).

Trial counsel was not deficient for failing to object to the trial court's instruction on the lesser included offense of possession of MDMA (Ecstasy) because the instruction explained the elements of pos-

session of MDMA with intent to distribute and delineated that charge from simple possession of MDMA; the charge substantially covered the principles in the defendant's request to charge and adequately instructed the jury as to the jury's consideration of the charged offense and the lesser offense, and since there was overwhelming evidence of the defendant's guilt, in that the defendant possessed a distribution amount of MDMA, the defendant could not show a reasonable probability that the outcome of the defendant's trial would have been different. *Taylor v. State*, 306 Ga. App. 175, 702 S.E.2d 28 (2010).

Defendant's claim that the defendant's trial counsel rendered ineffective assistance by failing to object to the trial court's Allen charge was unsupported, and the defendant could not show prejudice or harm because there was no error on which to premise the claims of ineffective assistance; the record would not support a finding that the trial court's Allen charge improperly coerced the jury because the jurors deliberated for a considerable time after the instruction was given, and the jurors reaffirmed the verdict when polled. *Sharpe v. State*, 288 Ga. 565, 707 S.E.2d 338 (2011).

Defendant's trial counsel was not ineffective in failing to object to the aggravated assault charge because the defendant could show neither deficient performance nor prejudice in that the charge was based on the applicable aggravated assault code section and the charge as a whole was not erroneous. *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

#### **Counsel's failure to pursue correct jury instruction.**

Because an erroneous jury instruction on an offense of aggravated child molestation violated an inmate's due process rights by allowing the jury to convict in a manner not charged in the indictment, and the inmate's trial counsel was ineffective in failing to object to the instruction, the inmate was properly granted habeas relief. *Hall v. Wheeling*, 282 Ga. 86, 646 S.E.2d 236 (2007).

The defendant's trial counsel was not ineffective in failing to request a charge

related to how the jury could consider the testimony of the lead detective who was excepted from the rule of sequestration given the overwhelming evidence of the defendant's guilt, because the state sufficiently showed that it needed the lead detective's presence in the courtroom for an orderly presentation of the case, and the defendant failed to show that any prejudice resulted from the trial court's failure to give the charge. *Morgan v. State*, 287 Ga. App. 569, 651 S.E.2d 833 (2007).

Trial counsel was not ineffective for failing to request in writing a jury instruction that excluded a statement that witnesses were presumed to speak the truth unless impeached. The court charged the jury that it could consider a number of factors, including a witness's manner of testifying, their means and opportunity for knowing the facts to which they testified, and the probability or improbability of their testimony. *Stanford v. State*, 288 Ga. App. 463, 654 S.E.2d 173 (2007), cert. denied, 2008 Ga. LEXIS 461 (Ga. 2008).

The trial court did not improperly instruct the jury on each of the elements of O.C.G.A. § 40-6-391, including intoxication by toxic vapors, as the charge stated the law accurately, and the complained-of language concerning toxic vapors was mere surplusage. Hence trial counsel was not ineffective in failing to object to said instruction. *Rylee v. State*, 288 Ga. App. 784, 655 S.E.2d 239 (2007).

As a jury charge was sufficient, defendant could not prove that trial counsel's failure to object to charge as given or to request certain charges fell outside the range of reasonable professional conduct; moreover, given the overwhelming evidence of guilt, defendant could not show prejudice. *Gathuru v. State*, 291 Ga. App. 178, 661 S.E.2d 233 (2008).

Defendant could not demonstrate a reasonable probability that the outcome of defendant's trial would have been different but for counsel's failure to object to language in an improper Allen charge. The language at issue was but one small part of an otherwise fair and balanced charge, and the charge as a whole could not be deemed unduly coercive; the jury was polled, and each juror affirmed the verdict as the one he or she had reached

and agreed upon. *Gilbert v. State*, 291 Ga. App. 898, 663 S.E.2d 299 (2008), cert. denied, 2008 Ga. LEXIS 883 (Ga. 2008).

Trial counsel was not ineffective in failing to request charges on voluntary manslaughter, self-defense, and accident as such instructions were contrary to the defense strategy, based on the defendant's testimony, of contending that the defendant did not have a gun in the defendant's hands until the fighting and shooting were finished. *Savior v. State*, 284 Ga. 488, 668 S.E.2d 695 (2008).

Defendant failed to demonstrate that defendant's trial counsel provided ineffective assistance because the failure to submit written charges was deficient or prejudicial, and although the defendant contended that defendant's trial counsel should have submitted written jury charges, the defendant failed to indicate which charges should have been requested; at the charge conference, trial counsel sought, unsuccessfully, to have the court charge on lesser included offenses and participated in the formulation of the remaining charges, including a detailed discussion on the identification charge. *Smith v. State*, 303 Ga. App. 831, 695 S.E.2d 86 (2010).

Trial counsel was not ineffective for failing to have the case submitted to the jury solely on the charge of voluntary manslaughter because the defendant failed to show deficient performance on trial counsel's part in withdrawing defendant's request to instruct the jury as to voluntary manslaughter since the crux of the defense was justification in defense of self. *Kendrick v. State*, 287 Ga. 676, 699 S.E.2d 302 (2010).

Trial counsel was not ineffective for withdrawing jury instructions on the defenses of accident and self-defense because no evidence was elicited at trial that would support a defense of accident or self-defense. *Jones v. State*, 287 Ga. 770, 700 S.E.2d 350 (2010).

Defendant failed to show prejudice due to trial counsel's failure to request a legally accurate charge on the specific factors the jury could consider in deciding witness credibility because the record showed that the trial court would have omitted a specific list of factors from the

court's charge on witness credibility even if a proper request had been made; the jury was not restricted to only considering impeachment and prior difficulties when deciding whether a witness was credible. *Weeks v. State*, 316 Ga. App. 448, 729 S.E.2d 570 (2012).

**Failure to request jury charge on proximate causation.** — Trial counsel was not ineffective for failing to request a jury charge on proximate causation as the jury charge was sufficient to inform the jury that, in order to convict the defendant of felony murder, the jury had to determine that the defendant caused or was a party with the codefendant in causing the victim's death during the escape phase of the underlying felonies. *Pennie v. State*, 292 Ga. 249, 736 S.E.2d 433 (2013).

**Counsel's failure to request instruction on identification.** — During defendant's trial for aggravated stalking and criminal trespass, trial counsel was not ineffective for failing to request pattern jury charges on identification. The jury saw the surveillance videos for themselves, and was able independently to judge the validity of the victim's identification; the defendant failed to show that the outcome would have been different if counsel had requested pattern jury charges on identification. *Reed v. State*, 309 Ga. App. 183, 709 S.E.2d 847 (2011).

**Failure to request instruction on abandonment.** — Trial counsel was not ineffective for failing to request a jury instruction on abandonment because the defendant made no admission to engaging in the underlying crime. *Simmons v. State*, 289 Ga. 773, 716 S.E.2d 165 (2011).

**Failure to request justification charge.**

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable

belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. *Philpot v. State*, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

**Failure to request defense of habitation charge.**

Trial counsel was not ineffective for failing to request a charge on the defense of habitation, O.C.G.A. § 16-3-23, because there was no evidence that the victim attempted to enter an apartment to harm anyone inside the building, and the evidence demonstrated that the victim went inside the apartment to escape from the defendant when the victim saw that the defendant had a gun; the evidence did not reflect that the victim's intent was other than to change the locks of the apartment. *Mubarak v. State*, 305 Ga. App. 419, 699 S.E.2d 788 (2010).

**Failure to request charge on mutual combat.** — Trial counsel did not perform deficiently by failing to request a charge on mutual combat because there was no evidence of a mutual intention to fight; at trial, the defendant presented the defense of accident and asserted that the defendant lacked any intention to shoot the victim, but there was no evidence that reflected that the defendant and the victim mutually agreed to fight each other. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

**Failure to request self defense instruction.** — Counsel was not ineffective for failing to pursue a request for a voluntary manslaughter instruction in a felony murder prosecution as the defendant's unequivocal testimony was that the defendant acted in self-defense out of fear of the victim, and without evidence that the defendant was provoked provided no basis for the instruction. *Browning v. State*, 283 Ga. 528, 661 S.E.2d 552 (2008).

**Failure to object to jury charge on kidnapping.** — With regard to a defendant's convictions for aggravated sodomy, rape, and other related crimes, trial counsel's decision not to object to the jury charge on kidnapping with bodily injury did not amount to ineffective assistance of counsel as the trial court employed the language of the relevant statute, O.C.G.A. § 16-5-40, and instructed the jury that

the offense of kidnapping with bodily injury occurs when a person abducts “or” steals away any person. The fact that the indictment charged the defendant with abducting “and” stealing away the victim did not require trial counsel to object to the jury charge as the statute provided only one way in which kidnapping can be committed, namely by abducting or stealing away the victim, and the jury charge using the statutory language was appropriate, even though the indictment used the conjunctive. *Greene v. State*, 295 Ga. App. 803, 673 S.E.2d 292 (2009), cert. denied, No. S09C0862, 2009 Ga. LEXIS 259 (Ga. 2009).

**Failure to object to jury charge on armed robbery.** — Trial counsel was not ineffective for failing to object to a discrepancy between the armed robberies as alleged in the indictment and the manner in which the jury was charged on the armed robbery offenses because the evidence uniformly showed that the article used in the robbery was a handgun; there was not a reasonable likelihood that the jury convicted the defendant of robbing the victims with a replica, which was mentioned in the trial court’s charge to the jury, because each victim referred to the weapon only as a handgun and explicitly referred to the victims’ fear of being shot. *Green v. State*, 310 Ga. App. 874, 714 S.E.2d 646 (2011), cert. denied, 2012 Ga. LEXIS 232 (Ga. 2012).

**Failure to object to charge on transferred intent.** — Trial counsel performed deficiently by failing to object to the giving of a charge on transferred intent and the prosecutor’s closing argument addressing the inapplicable principles of transferred intent because the charge was not adjusted to the evidence since there was no evidence that the defendant was intending to shoot any other person when the defendant shot the victim so as to bring the case within the typical “innocent bystander” scenario in which the doctrine of transferred intent was applied; however, in light of the overwhelming evidence of the defendant’s guilt, it was highly probable that the charge did not contribute to the verdict, and the defendant failed to show the requisite prejudice, in that there was no reasonable probability that the

outcome of the trial would have been different had trial counsel objected to the prosecutor’s argument and the trial court’s charge. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

**Failure to challenge admission of testimony.** — Trial counsel was not ineffective for failing to challenge the admission of testimony regarding the victim’s dying declaration because the statement satisfied the requirements for admission of a dying declaration under former O.C.G.A. § 24-3-6 (see now O.C.G.A. § 24-8-804); the defendant identified no valid basis for objection. *Mathis v. State*, 291 Ga. 268, 728 S.E.2d 661 (2012).

**Failure to object to jury instruction on intelligence.** — Because no reversible error occurred with respect to the instruction that the jury could consider the intelligence of the witnesses to decide the witnesses’ credibility, the codefendant could not succeed on the alternative claim that trial counsel rendered ineffective assistance in failing to object to that instruction. *Howard v. State*, 288 Ga. 741, 707 S.E.2d 80 (2011).

**Failure to object to jury charge on impeachment.** — Trial counsel was not ineffective for failing to object to an instruction regarding impeachment of a witness by proof of prior contradictory statements because the charge did not constitute an expression of opinion as to the guilt of the accused in violation of O.C.G.A. § 17-8-57; the charge stated the law accurately and was mere surplusage that did not mislead the jury. *Bellamy v. State*, 312 Ga. App. 899, 720 S.E.2d 323 (2011).

**Failure to request charge on lesser included offense.**

Because a trial counsel’s decision not to request a jury charge on a lesser-included offense in order to pursue an all-or-nothing defense was a matter of trial strategy, and there was no indication that the defendant would have agreed to charges on lesser-included offenses, given that the defendant relied on a claim of innocence, counsel was not ineffective in failing to request an instruction on a lesser-included offense. *Davis v. State*, 287 Ga. App. 786, 653 S.E.2d 104 (2007).

Because trial counsel made a strategic decision not to present a written request

for a lesser-included misdemeanor obstruction charge given that the defendant decided to pursue an “all or nothing” defense, and as a result, the trial court did not err in not charging the jury on misdemeanor obstruction, *sua sponte*, which would have undermined that defense, trial counsel was not ineffective in failing to request the same; hence, the defendant was not entitled to a new trial on said grounds. *Owens v. State*, 288 Ga. App. 771, 655 S.E.2d 244 (2007), cert. denied, 2008 Ga. LEXIS 274 (Ga. 2008).

Defendant’s trial counsel was not ineffective in failing to request jury instruction on reckless conduct as lesser-included offense of aggravated assault as there was no evidence that would support a finding that defendant’s driving a vehicle directly at a deputy and not stopping at a police roadblock was criminally negligent rather than intentional; further, trial counsel testified that the decision to not request a jury charge on the lesser included offense was a matter of trial strategy to pursue an all or nothing defense for the aggravated assault charge. *Taul v. State*, 290 Ga. App. 288, 659 S.E.2d 646 (2008).

Defendant failed to establish that defendant received ineffective assistance of counsel because trial counsel erroneously acceded to a simple assault charge and failed to request a jury charge on battery because the jury’s finding of guilt on aggravated assault necessarily required a finding that defendant used defendant’s hands in a way that did or was likely to result in serious bodily injury, which required the jury to reject the opportunity to find mere violent injury, which would have been the basis for a simple assault. Accordingly, the trial court was authorized to find that defendant failed to meet the burden to show that defendant’s defense was so prejudiced that there was a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Armstrong v. State*, 292 Ga. App. 145, 664 S.E.2d 242 (2008).

Trial counsel was not ineffective for failing to request a jury charge on the lesser included offense of reckless conduct. Counsel explained that the defendant was adamant that the defendant was

not guilty of any crime and “we didn’t want to be in a situation where a jury could just — could fall back on a lesser charge that may not have been justified.” *Atwell v. State*, 293 Ga. App. 586, 667 S.E.2d 442 (2008).

Evidence was insufficient to establish a reasonable probability that the jury would have found defendant guilty of voluntary manslaughter and thus trial counsel was not ineffective in requesting this instruction since the evidence demonstrated that the victim and defendant were in rival gangs; that the victim and others drove into an apartment complex to pick up a friend; that an occupant in the victim’s vehicle poked a gun out of a window; and that defendant and the defendant’s codefendant shot at the vehicle, killing the victim and wounding others. *Hung v. State*, 284 Ga. 796, 671 S.E.2d 811 (2009).

In a malice murder prosecution, defense counsel was not ineffective in failing to request an instruction on voluntary manslaughter, as the defendant was fully advised on this issue and decided to pursue an “all or nothing” strategy and rely solely on self-defense. *Brown v. State*, 285 Ga. 324, 676 S.E.2d 221 (2009).

Although the defendant claimed that trial counsel was ineffective in failing to request a jury charge on robbery as a lesser included crime in armed robbery, the defendant failed to raise that argument in the motion for new trial; thus, the defendant waived the right to argue this issue on appeal. *Ransom v. State*, 298 Ga. App. 360, 680 S.E.2d 200 (2009).

Because the defendant could show neither deficient performance nor prejudice due to counsel’s failure to request jury charges on lesser included offenses, defendant’s claim of ineffective assistance of counsel claim was correctly rejected by the trial court when trial counsel ensured that the jury was allowed to consider involuntary manslaughter as a lesser included offense of the felony murder counts, and the verdict form included options for finding the defendant guilty of murder or the lesser included offense of involuntary manslaughter or not guilty; since the jury found the defendant guilty of the felony murder counts, rejecting the lesser included offense of involuntary manslaughter

ter based on reckless conduct or simple battery, there was no reasonable probability that the outcome of the trial would have been different if counsel had also requested charges on reckless conduct and simple battery. *Sigman v. State*, 287 Ga. 220, 695 S.E.2d 232 (2010).

During the defendant's trial for child molestation, defense counsel was not ineffective for failing to request charges on sexual battery and the defense of accident or on mistake of fact because under the evidence, charges on those subjects were not authorized; counsel testified that counsel did not seek a charge on sexual battery because the defendant denied touching the victim, and as all of the charges the defendant contended should have been requested would require that the defendant admit that the defendant touched the victim as alleged, the charges would have been inconsistent with the defense's theory that there was no touching at all and were inconsistent with the defendant's adamant denial that the defendant touched the victim as the victim contended. *Kay v. State*, 306 Ga. App. 666, 703 S.E.2d 108 (2010).

Defendant failed to show that defendant's trial counsel rendered ineffective assistance by failing to request jury charges as to the lesser included offenses of robbery by intimidation and theft by taking although trial counsel could not recall counsel's specific reasons for not requesting a charge on the lesser-included offenses of armed robbery, the defendant nevertheless failed to show that trial counsel's decision was not a reasonable trial strategy or that such a request would have affected the outcome of the trial. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Trial counsel's performance was not deficient due to counsel's failure to request a jury charge on simple assault as a lesser included offense of the charged crime of aggravated assault because there was no evidence showing that the defendant committed merely simple assault; the evidence showed that the defendant's assault upon the victim was with a screwdriver within the purview of the aggravated assault statute, O.C.G.A. § 16-5-21(a)(2). *Davis v. State*, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

Defendant failed to demonstrate that the defendant's trial counsel erred by failing to request a jury charge on simple battery as a lesser included offense of the charged crime of aggravated assault because there was no evidence that the defendant made physical contact with the victim or caused physical harm to the victim; since the state's evidence establishes all of the elements of an offense, and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense. *Davis v. State*, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

Defendant's trial counsel was not ineffective in failing to request a jury charge on assault as a lesser included offense of aggravated assault because the evidence did not reasonably raise the issue that the defendant was guilty only of the lesser crime. *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Trial counsel was not ineffective in failing to request jury instructions on a lesser included offense because the evidence did not reasonably raise the issue that the defendant could be guilty only of the lesser crimes; trial counsel testified that based on the evidence, the defendant did not believe there was a valid basis for requesting any lesser included offenses. *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

**Failure to request instruction on abandonment and accessory after the fact.** — In an armed robbery prosecution, defense counsel was not deficient in not requesting jury charges on the law of abandonment and accessory after-the-fact as there was no evidence that the defendant abandoned the crime before an overt act occurred, or that the defendant was an accessory after the fact rather than a party to the robbery. *Bihlear v. State*, 295 Ga. App. 486, 672 S.E.2d 459 (2009).

**Failure to request instruction on accessory after the fact.** — Trial counsel was not ineffective for failing to request a jury instruction on accessory after the fact because regardless of whether any evidence would have authorized the jury to conclude that the defendant's connection with the crime of murder charged in the bill of indictment was that of an acces-

sory after the fact, the trial court would not have been authorized to give any charge on accessory after the fact when the defendant was not indicted for both murder and hindering the apprehension of a criminal or any other offense in the nature of an obstruction of justice. *Vergara v. State*, 287 Ga. 194, 695 S.E.2d 215 (2010).

**Failure to request limiting instruction.**

Prior inconsistent statement of a witness who took the stand and who was subject to cross-examination was admissible as substantive evidence. Thus, because the defendant, who testified at trial, was not entitled to a limiting instruction as to the use of the defendant's prior inconsistent statements, counsel was not ineffective for failing to request the instruction; likewise, the defendant's claim that counsel was ineffective for failing to object to the state's closing argument telling the jurors that they could consider this testimony as substantive evidence also failed. *Gregory v. State*, 297 Ga. App. 245, 676 S.E.2d 856 (2009).

Trial counsel was not ineffective by failing to request a limiting instruction regarding the jury's consideration of evidence of the defendant's prior felony convictions because assuming deficient performance in the failure to request a limiting instruction, the defendant did not establish prejudice therefrom; the defendant failed to show that the outcome of defendant's trial would have been different had the jury been told the jury was to consider the prior convictions only for the purposes of establishing the predicate offenses of the counts in which the convictions were described. *Higginbotham v. State*, 287 Ga. 187, 695 S.E.2d 210 (2010).

Defendant was not deprived of the defendant's right to effective assistance of counsel because the defendant's trial counsel's failure to request the limiting charge suggested by the defendant was a reasonable trial tactic and did not amount to deficient performance, and the defendant did not show that the defendant was prejudiced by trial counsel's failure to request the charge in light of the overwhelming evidence adduced against the defendant; counsel made a strategic deci-

sion not to request a charge on conspiracy on the ground that the charge could operate to the defendant's detriment. *White v. State*, 308 Ga. App. 38, 706 S.E.2d 570 (2011).

**Failure to request circumstantial evidence instruction.** — Because the evidence rested largely on the direct evidence provided by the eyewitnesses to the event, and there was no reasonable likelihood that had the circumstantial evidence charge been given to the jury the outcome of the trial would have differed, the defendant's trial counsel could not be found ineffective in failing to request the instruction. *Holden v. State*, 287 Ga. App. 472, 651 S.E.2d 552 (2007), cert. denied, No. S08C0189, 2008 Ga. LEXIS 153 (Ga. 2008).

**Failure to request curative instruction.**

Trial court did not err by denying a defendant's motion for a new trial based on the defendant's contention that the defendant received ineffective assistance of counsel regarding convictions for aggravated sexual battery and child molestation involving the defendant's eight-year-old child, since despite trial counsel acknowledging that trial counsel failed to move for a mistrial or request a curative instruction after the state questioned the defendant about a prior act of sodomy on a 14-year-old, trial counsel's objection to the testimony was sustained. Thus, the jury heard no evidence concerning the circumstances giving rise to the sodomy charge and, further, heard no evidence refuting or contradicting the defendant's testimony that the defendant was acquitted of that charge. *Dyer v. State*, 295 Ga. App. 495, 672 S.E.2d 462 (2009).

Defendant failed to show any prejudice from trial counsel's failure to request a curative instruction directing the jurors to consider only the predicate offenses currently before the jury because the trial court repeatedly and thoroughly instructed the jury not to consider the allegations of the indictment as evidence. *Hicks v. State*, 315 Ga. App. 779, 728 S.E.2d 294 (2012).

**Failure to object to instruction did not preclude appellate review when plain error exists.** — Trial court erred in

instructing the jury that the jury could convict the defendant of committing terroristic threats, O.C.G.A. § 16-11-37(a), in a manner not alleged in the indictment because the indictment alleged that the defendant threatened to commit murder with the purpose of terrorizing the victim, but the trial court twice instructed the jury that terroristic threats involved any violence or any crime of violence; under the circumstances, without a remedial instruction, it was probable that the jury found the defendant guilty of committing the act of terroristic threats in a manner not charged in the indictment, and defendant's right to due process was violated due to a fatal variance between the proof and the indictment. The jury charge constituted plain error which affected substantial rights of the defendant, and thus the failure to object to the jury instruction did not preclude appellate review of the charge. *Milner v. State*, 297 Ga. App. 859, 678 S.E.2d 563 (2009).

**Failure to request bare suspicion instruction.** — Defendant's contention on appeal that defense counsel was ineffective for failing to timely request a charge on bare suspicion or to object to the trial court's refusal to give the charge once requested failed because defendant was not entitled to such a charge. Additionally, the charges that the trial court gave on presumption of innocence and reasonable doubt embodied all the elements of a bare suspicion charge, rendering such a charge unnecessary. *Range v. State*, 289 Ga. App. 727, 658 S.E.2d 245 (2008).

**Slip of the tongue in jury instruction.**

Although the trial court merely made a slip of the tongue when it did not properly state the state's burden of proof on one affirmative defense, the court correctly stated the burden of proof in a second affirmative defense, defendant's attorney also informed the jury about the burden of proof, and written instructions were given to the jury; accordingly, defendant's ineffective assistance of appellate counsel claim was properly denied. *Arthur v. Walker*, 285 Ga. 578, 679 S.E.2d 13 (2009).

Although the defendant claimed that the defense attorney failed to object to a portion of the charge to the jury regarding

the defense of justification, the existence of a mere verbal inaccuracy in the jury instruction, resulting from a palpable slip of the tongue and which could not have misled or confused the jury, did not provide a basis for reversal of the conviction. Therefore, the defendant did not prevail on the defendant's ineffective assistance of counsel claim because the defendant could not show that a reasonable probability existed that, but for counsel's errors the outcome at trial would have been more favorable. *Render v. State*, 288 Ga. 420, 704 S.E.2d 767 (2011).

**Failure to request instruction on witness testifying under immunity.** —

In a defendant's criminal prosecution for, inter alia, felony murder, defense counsel was not ineffective for failing to request a jury charge on a witness testifying pursuant to a grant of immunity because the witness at issue was never charged, arrested, or prosecuted as to the events forming the basis of the instant case. *Watkins v. State*, 285 Ga. 107, 674 S.E.2d 275 (2009).

**Failure to request instruction on alibi.** —

Ineffective assistance of counsel claim failed because the absence of an alibi charge did not change the fact that no juror who believed the defendant's testimony could have found that the state had carried the state's burden of proof and, thus, the defendant failed to show a reasonable probability that the outcome of the trial would have been different had counsel requested and received an alibi instruction. *Riley v. State*, 319 Ga. App. 823, 738 S.E.2d 659 (2013).

**Failure to obtain recusal of trial judge.** —

Because the absence of a Ga. Unif. Super. Ct. R. 25.1 affidavit in support of defendant's motion to recuse the trial judge did not affect the court's consideration of the motion, and although defense counsel was unable to cite any law indicating that the judge should be disqualified after presiding over defendant's prior probation revocation proceedings, defendant did not demonstrate either deficient performance by counsel or prejudice in failing to secure the trial judge's recusal. *Paul v. State*, 296 Ga. App. 6, 673 S.E.2d 551 (2009).

**Failure to request charge on entrapment.** — Trial counsel's failure to

request a jury charge on entrapment was not deficient performance of counsel because the defendant was not entitled to a jury charge on entrapment; the defendant did not admit to the commission of the crime, and the state's case did not show any evidence of entrapment. *Bolton v. State*, 310 Ga. App. 801, 714 S.E.2d 377 (2011).

**Failure to request charge on fingerprint evidence.** — Trial counsel was not ineffective in failing to request a jury charge on fingerprint evidence as the defendant failed to show that trial counsel's decision was patently unreasonable when trial counsel testified that counsel deliberately chose not to request the charge because the evidence was consistent with the defense that the defendant's fingerprints were on a television two burglars were selling because the defendant was inspecting the television to buy the television. *Chandler v. State*, No. A12A2566, 2013 Ga. App. LEXIS 224 (Mar. 19, 2013).

**Failure to request mistrial based on presence of SWAT team members.** — Trial counsel was not ineffective for failing to request a mistrial or curative instructions because the defendant did not show with reasonable probability that the presence of SWAT team members in the courtroom affected the outcome of the trial. *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

**Failure to request mistrial.**

Because trial counsel's failure to move for a mistrial could have been a strategic decision, and because the defendant did not question trial counsel concerning this decision, the defendant failed to show that this failure amounted to deficient performance. *Vonhagel v. State*, 287 Ga. App. 507, 651 S.E.2d 793 (2007).

As there was no showing that a juror heard anything improper during a bench conference, the trial court did not err in not sua sponte declaring a mistrial. Defense counsel was not ineffective for not moving for a mistrial or removal of the juror as such motion would have been denied. *Smith v. State*, 284 Ga. 304, 667 S.E.2d 65 (2008).

Trial court did not err in finding that the defendant's trial counsel was not ineffective for failing to move for a mistrial or

object to the state proceeding against the defendant on a different indictment in the midst of trial because any error in failing to try the defendant upon a "perfect" indictment was manifestly harmless when after the trial court severed an armed robbery charge from one of the indictments, the charges were identical in the two indictments, and the defendant did not show that the defendant suffered any prejudice from the state's mistake or by proceeding under the older indictment; the trial court's instruction to the jury regarding the mistake dealt with trial counsel's concern that the jury would think the defendant had two pending indictments, and the instruction was sufficient to cure any error. *Smith v. State*, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

Because defendant's failure to renew motions for a mistrial after declining a curative instruction waived the issue on appeal, and because the outcome of the trial would not have been different if trial counsel had renewed the motions, defendant was not prejudiced by counsel's failure to do so. *Johnson v. State*, 305 Ga. App. 853, 700 S.E.2d 735 (2010).

Defendant failed to demonstrate that the defendant was deprived of effective assistance of counsel due to counsel's failure to seek a mistrial when the prosecutor elicited certain testimony from the police detective who investigated the case and procured the photographic lineup because the defendant failed to show a reasonable probability that an objection or motion for mistrial related to the detective's testimony would have changed the outcome of the defendant's trial; the robbed teller made an in-court identification of the defendant as the perpetrator, and the jurors were shown video footage of the robber committing the crime as well as still photographs of the robber's face. *Ware v. State*, 307 Ga. App. 782, 706 S.E.2d 143 (2011).

Defendant was not denied effective assistance of counsel due to trial counsel's failure to renew a motion for mistrial after the trial court gave a curative instruction because the defendant failed to demonstrate prejudice; trial counsel had twice moved for a mistrial, which the trial court denied, and the trial court did not abuse

the court's discretion in giving the curative instruction, which preserved the defendant's right to a fair trial. *Sanders v. State*, 290 Ga. 445, 721 S.E.2d 834 (2012).

Trial counsel was not ineffective for failing to request a mistrial after learning of improper conduct between two jurors and a spectator at the trial because the communication at issue did not involve extrajudicial information, a discussion of the facts or legal issues in the case, or improper conduct by the jurors themselves and, thus, the defendant suffered no prejudice. *Causey v. State*, 319 Ga. App. 841, 738 S.E.2d 672 (2013).

**Failure to file motion for directed verdict.**

Trial counsel was not ineffective for failing to move for a directed verdict on malice and felony murder charges because the evidence was sufficient to authorize a conviction on malice murder, and a motion for directed verdict would have been fruitless. *Kendrick v. State*, 287 Ga. 676, 699 S.E.2d 302 (2010).

Trial court erred by denying the defendant's motion for new trial on the ground that trial counsel was ineffective by failing to move for a directed verdict as to a count of the indictment alleging that the defendant operated a motor vehicle as a habitual violator without a valid driver's license because the state failed to prove the charge alleged in that count; because the trial court would have been required to grant a motion for directed verdict, trial counsel was ineffective by failing to make such a motion. *Murray v. State*, 315 Ga. App. 653, 727 S.E.2d 267 (2012).

Because the evidence was sufficient to sustain the defendant's convictions and to establish venue, there was no merit to the defendant's claim that trial counsel was ineffective for failing to move for a directed verdict of acquittal on those issues. *Bearden v. State*, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

**Inadequate presentation of mitigation case during sentencing.**

Habeas court's order denying the petitioner's claim that the petitioner was entitled to a new sentencing trial was reversed and the petitioner's death sentence was vacated because trial counsel performed deficiently by failing to sufficiently

develop mitigating evidence from non-experts, and there was a reasonable probability that the jury would have reached a different outcome in the sentencing phase of the petitioner's trial if the additional evidence habeas counsel obtained had been presented at trial; trial counsel failed to fully investigate whether the petitioner had suffered one or more brain injuries prior to the petitioner's crimes, and unduly limiting counsel's interviews of the petitioner's family and friends to an unreasonably narrow range of persons, and there was additional evidence from non-experts concerning the petitioner's traumatic childhood and the petitioner's change in behavior and apparent mental distress following two head injuries. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

**Failure to file an appeal.**

Given that the defendant had no right to file a direct appeal from a guilty plea that was evident from the record, a motion for an out-of-time appeal, which alleged ineffective assistance of counsel, was properly denied, and counsel could not be deemed ineffective for failing to inform the defendant of the right to appeal; thus, the defendant's only remedy was by habeas corpus. *Barlow v. State*, 282 Ga. 232, 647 S.E.2d 46 (2007).

A trial court abused the court's discretion in ruling the court lacked jurisdiction to consider an inmate's motion for an out-of-time appeal because the motion was based on a claim that the inmate's right to a direct appeal was denied due to ineffective assistance of counsel, and on that claim, the trial court was required to inquire into the facts to determine responsibility for the failure to pursue a timely appeal. *Duncan v. State*, 291 Ga. App. 580, 662 S.E.2d 337 (2008).

**Meritless enumerations of error.**

Because the defendant failed to cite any legal authority requiring trial counsel, in order to be effective, to poll the jury, this claim of ineffective assistance of counsel lacked merit. *Vonhagel v. State*, 287 Ga. App. 507, 651 S.E.2d 793 (2007).

**Refusal to withdraw as trial counsel after defendant filed bar complaint.** — In defendant's convictions for armed robbery, kidnapping, and aggra-

vated assault in connection with robbery of a fast food restaurant, defendant failed to show trial counsel performed deficiently by failing to withdraw as counsel despite existence of conflict of interest created by defendant having filed a bar complaint against trial counsel; evidence supported trial court's determination that defendant failed to carry the burden of proving that trial counsel's refusal to withdraw constituted ineffective assistance. *Holsey v. State*, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

#### **Ineffectiveness of post conviction counsel.**

Because the state failed to prove venue beyond a reasonable doubt, the defendant's appellate counsel provided professionally deficient performance in failing to raise the meritorious issue on appeal, and the defendant was prejudiced thereby; the defendant was convicted in Toombs County of selling cocaine to an informant, and evidence that the drugs sales occurred somewhere in Vidalia, Georgia, was insufficient to establish that the crimes occurred in Toombs County because the habeas court properly took judicial notice that Vidalia was located in two different counties, Toombs and Montgomery. *Thompson v. Brown*, 288 Ga. 855, 708 S.E.2d 270 (2011).

Habeas court erred in granting the petitioner's application for habeas corpus relief because the petitioner could not show that but for the errors of appellate counsel, the outcome of the appeal would have been different in reasonable probability; irrespective of any contention that there was ineffective assistance, the petitioner remained a fugitive from justice, and the petitioner's appeal would have been dismissed. *Tompkins v. Hall*, 291 Ga. 224, 728 S.E.2d 621 (2012).

#### **Failure to appear at arraignment.**

— Trial counsel was not ineffective for failing to appear at the arraignment because the defendant did not assert any harm arising from counsel's failure to appear other than the loss of the right to a hearing on a motion to suppress; the defendant could not show that the motion to suppress had any likelihood of success. *Coney v. State*, 316 Ga. App. 303, 728 S.E.2d 899 (2012).

### **C. Other Examples**

#### **Criminal Procedure Discovery Act constitutional.**

The discovery requirements of O.C.G.A. § 17-16-4, relating to the presentence hearing did not violate a defendant's right to effective assistance of counsel; counsel may freely investigate for mitigating evidence, knowing that the identity of any potentially harmful witness resulting from that investigation need only be produced to the state in reciprocal discovery should the defense decide to call that witness at the presentence hearing. *Muhammad v. State*, 282 Ga. 247, 647 S.E.2d 560 (2007).

#### **Child molestation cases.**

A defendant in a child molestation case had not shown ineffective assistance of counsel where a charge on good character was not required because the defendant had not put the defendant's good character into issue, the defendant had not shown prejudice from an isolated comment on the defendant's silence, and the defendant had not shown prejudice from counsel's failure to impeach the victim with a delinquency adjudication. *Kurtz v. State*, 287 Ga. App. 823, 652 S.E.2d 858 (2007), cert. denied, No. S08C0321, 2008 Ga. LEXIS 184 (Ga. 2008).

Trial counsel was not deficient in failing to introduce evidence that a physical examination of a child victim found no physical evidence of alleged sexual abuse. Trial counsel clearly made a tactical decision not to call the physician who examined the victim and, instead, elected to comment on the state's failure to provide physical evidence to support the molestation allegations. *Shaffer v. State*, 291 Ga. App. 783, 662 S.E.2d 864 (2008).

In a child molestation prosecution, the defendant contended that defendant's trial counsel was deficient in failing to attack the validity of the search warrant used to obtain a DNA sample as the supporting affidavit failed to disclose that the victims' outcry was made to their parent shortly after the parent lost primary custody of the parent's other child. This claim failed because even if this evidence had been included, the victim's statement to the affiant that the defendant fathered the victim's child was sufficient to support

the warrant. Furthermore, defense counsel was not deficient in failing to object to testimony about the alleged physical abuse of the victims as counsel reasonably believed such an objection would be overruled, and planned to use this testimony to bolster the defense theory that the victims were not credible. *Farris v. State*, 293 Ga. App. 674, 667 S.E.2d 676 (2008).

Trial counsel's failure to subpoena a child's case file did not constitute ineffective assistance as the file regarding the child was confidential and not subject to direct subpoena by the defendant, and the defendant did not demonstrate that such action would have changed the outcome of the child molestation trial. Additionally, failure to impeach a victim's parent with the parent's status as an illegal alien also did not constitute ineffective assistance as there was no logical reason to believe that the parent's illegal alien status, known only later to police, motivated or shaded the parent's trial testimony against the defendant; indeed, the parent's illegal alien status would have been a motive for the parent not to report the crime against the child in the first place. *Pareja v. State*, 295 Ga. App. 871, 673 S.E.2d 343, *aff'd*, 286 Ga. 117, 686 S.E.2d 232 (2009).

In convictions of child molestation, aggravated child molestation, and aggravated sexual battery, defendant failed to establish ineffective assistance of trial counsel since the failure to object to certain testimony from a victim-witness advocate was legitimate trial strategy, the failure to object to similar transaction evidence was proper since this evidence was admissible, and the failure to object to certain closing argument statements would not have affected the trial's outcome under the circumstances. *Woods v. State*, 304 Ga. App. 403, 696 S.E.2d 411 (2010).

Trial counsel was not ineffective in failing to question the qualifications and credibility of the expert who took the child molestation victim's statement because the state's direct examination at trial showed that the expert who took the victim's statement was well-qualified with 15 years' experience in assisting children and teenagers suffering from severe mental illness or trauma. *Robinson v. State*, 308 Ga. App. 45, 706 S.E.2d 577 (2011).

Trial counsel was not ineffective in failing to ask for a hearing on the admissibility of the child molestation victim's videotaped statement because counsel testified that counsel chose not to request a hearing under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) since counsel had never seen a victim's statement declared inadmissible, and counsel did not want the delay resulting from such a request to give the state additional time to prepare the state's case; trial counsel was under no obligation to invoke his or her client's legal right to a hearing designed to protect that client's interests if the invocation of that abstract right would, in his or her professional judgment of the circumstances presented by a specific case, do actual harm to those interests. *Robinson v. State*, 308 Ga. App. 45, 706 S.E.2d 577 (2011).

Trial court's determination that a defendant's counsel was not ineffective for failing to object to a line of questioning regarding the witnesses' belief that the young victims were telling the truth was not clearly erroneous as counsel had pursued a reasonable trial strategy; the defense in the case, involving multiple sexual offenses committed by the defendant against young boys, was that very young children were susceptible to telling stories and misconstruing the facts. *Gregoire v. State*, 309 Ga. App. 309, 711 S.E.2d 306 (2011).

Defendant, in a child molestation case, failed to show ineffective assistance from trial counsel's decisions not to object to allowing the jury to see translations of notes written by the defendant to the victim and by not objecting to the admission of adult pornography found in the defendant's cell phone because the letters supported the defense counsel's strategy by showing that the victim had a motive to invent the abuse as a means of getting the defendant out of the life of the victim's parent and the adult pornography supported the defense counsel's strategy that the defendant was only attracted to adults, and not children. *Medrano v. State*, 315 Ga. App. 880, 729 S.E.2d 37 (2012).

Trial counsel was not ineffective for failing to object to testimony that the

defendant could have molested the victim's brother because the evidence included more than just the allegations made in the initial outcry; thus, the defendant failed to show a reasonable probability that the outcome of the trial would have been more favorable to the defendant had the testimony been excluded. *Henry v. State*, 316 Ga. App. 132, 729 S.E.2d 429 (2012).

#### **Effective counsel established.**

Because the court of appeals found no reasonable possibility that the result of the defendant's trial would have been different if trial counsel had successfully objected to the evidence that the victim was being hidden, that the victim's grandmother had been indicted for lying, or by failing to object when the victim's foster mother bolstered the victim's credibility, the court rejected the defendant's ineffective assistance of counsel claims. *Payne v. State*, 290 Ga. App. 589, 660 S.E.2d 405 (2008).

Defendant's drug convictions were appropriate because counsel's trial strategy did not amount to ineffective assistance of counsel. Trial counsel testified that counsel's actions were done as a part of trial strategy to discredit the testimony of defendant's ex-wife and to show that she had a self-serving reason to testify falsely and get a lesser sentence. *Carter v. State*, 308 Ga. App. 686, 708 S.E.2d 595 (2011), cert. denied, No. S11C1141, 2011 Ga. LEXIS 573 (Ga. 2011).

Evidence supported a conclusion that the defendant failed to show deficient performance related to the amount of time trial counsel spent consulting with the defendant because counsel testified that counsel met with the defendant multiple times during the course of the case, showed the defendant materials obtained through discovery, and discussed with the defendant medical records, how to respond to the state's allegations, and whether the defendant would testify at trial. *Jackson v. State*, 310 Ga. App. 476, 713 S.E.2d 679 (2011).

Because the defendant made no showing that the defendant's wife lacked authority to consent to a search of the marital residence, because trial attorney's strategic decisions not to pursue a defense

or to request a jury poll were not patently unreasonable, and because the defendant's claims were not waived by appellate counsel, the defendant failed to show that the defendant was entitled to a new trial based on counsel's alleged ineffectiveness. *Davis v. State*, 311 Ga. App. 699, 716 S.E.2d 710 (2011).

Claim of ineffective assistance of counsel failed because overwhelming evidence of the defendant's guilt was presented at trial and, while the defendant contended that prejudice should have been presumed because trial counsel's actions amounted to a constructive denial of counsel, the record did not show an entire failure of counsel to meaningfully test the prosecution's case. The record demonstrated that trial counsel attempted to hold the prosecution to the prosecution's heavy burden of proof beyond a reasonable doubt, and counsel, who had spent a significant amount of time preparing for trial, made numerous objections to testimony and evidence introduced through the prosecutor's direct examinations of the state's witnesses. *Wade v. State*, 315 Ga. App. 668, 727 S.E.2d 275 (2012).

Defendant's claim of ineffective assistance of counsel failed because counsel could not be ineffective for failing to object to testimony that did not affect the outcome of the trial, nor was counsel deficient in eliciting an arresting officer's testimony that the officer had heard over the police radio that the defendant was armed with a gun and prepared to use the gun, as the question was designed to show that the officer was being overly dramatic, which it did and was not a patently unreasonable tactic. *Westbrook v. State*, 291 Ga. 60, 727 S.E.2d 473 (2012).

Claim of ineffective assistance of counsel failed because trial counsel understood the significance of gunpowder travel testimony, but chose not to concentrate on it because counsel did not think that the distance between the defendant and the victim was significant, and the evidence showed that the defendant intentionally grabbed the pistol and fired the pistol, creating a foreseeable risk of death that was inherently dangerous. *Harris v. State*, 291 Ga. 175, 728 S.E.2d 178 (2012).

#### **Failure to investigate and present**

**mitigating evidence in death penalty.**

— In a death penalty case, a habeas court properly found that trial counsel was deficient in investigating and presenting mitigating evidence regarding an inmate's childhood abuse and neglect and the inmate's history of substance abuse and depression. The inmate suffered prejudice because the evidence that should have been presented, showing that the inmate's history of abuse and neglect had led to the inmate's major depression and the inmate's early exposure to alcohol and drugs, would have greatly undermined the state's argument that the inmate had freely chosen a life of addiction. *Hall v. McPherson*, 284 Ga. 219, 663 S.E.2d 659 (2008).

**Conflict of interest.**

An inmate had been denied effective assistance of counsel under the Sixth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIV based on an actual conflict of interest because both trial and appellate counsel did not diligently pursue a jury array issue based on an agreement that the public defender's office had with superior court judges, despite their belief that the issue was a strong one. The attorneys' duties to their employer, the public defender's office, directly conflicted with their duties of loyalty and zealous advocacy to their client under Ga. St. Bar R. 4-102(d):1.7, and the conflict significantly affected the representation the inmate received. *Edwards v. Lewis*, 283 Ga. 345, 658 S.E.2d 116 (2008).

Trial court erred in granting a new trial based on ineffective assistance of counsel due to counsel's prior employment in a public defender's office where another attorney had briefly represented the state's key witness against the defendant because the defendant failed to show how the conflict of interest compromised the attorney's representation of the defendant. *State v. Abernathy*, 289 Ga. 603, 715 S.E.2d 48 (2011).

Record belied any assertion that trial counsel had any divided loyalties between the defendant and a man who had been a suspect in the murder and testified as a state's witness at trial or that counsel represented the man in any way during the defendant's trial because counsel ac-

tually targeted the man as one of the people other than the defendant who had actually committed the murder. *Wheeler v. State*, 290 Ga. 817, 725 S.E.2d 580 (2012).

**Pending disciplinary action and subsequent surrender of license.**

— Trial counsel was not ineffective per se due to the fact that there was a pending disciplinary action against counsel at the time of trial or due to the subsequent surrender of counsel's license to practice law. *Simmons v. State*, 291 Ga. 705, 733 S.E.2d 280 (2012).

**Issue not developed.**

Habeas court properly denied habeas petition based on ineffective assistance of trial counsel where although it was error to rule against appellant on ground that appellant, who had pleaded guilty to drug possession charges, had expressed satisfaction with trial counsel at a plea hearing, habeas court had also ruled against appellant on the ground that it did not find that appellant's testimony regarding attorney's performance was credible. *Jackson v. State*, 283 Ga. 462, 660 S.E.2d 525 (2008).

Defense counsel was not ineffective for failing to call a psychologist to testify on behalf of the defendant because any attempt to do so would have been denied; at the hearing on the defendant's motion for a new trial, the trial court indicated that the trial court would not have allowed the psychologist to testify because facts needed to support the psychologist's opinion were never placed into the record. *Kirkland v. State*, 292 Ga. App. 73, 663 S.E.2d 408 (2008).

**Counsel ineffective but defendant failed to show prejudice.**

— In a felony murder trial, the prosecutor's statement concerning the defendant's failure to call police about the victim's stabbing was an improper comment on the defendant's silence or failure to come forward, and defense counsel was deficient in failing to object. But given the weight of the evidence against the defendant, the defendant failed to show that, absent counsel's deficient performance, there was a reasonable probability the outcome of the trial would have been different. *Lampley v. State*, 284 Ga. 37, 663 S.E.2d 184 (2008).

While trial counsel's introduction into evidence of a prejudicial police report and failure to seek a limiting instruction on the report's use constituted deficient performance, the defendant's ineffective assistance claim failed because the defendant could not show prejudice in light of the overwhelming evidence against the defendant. *Berry v. State*, 318 Ga. App. 806, 734 S.E.2d 768 (2012).

**Counsel not ineffective in representation of minor.** — Trial counsel's failure to seek a Jackson-Denno hearing to suppress the defendant's statement to the police did not amount to ineffective assistance because after detailing the numerous factors considered, the trial court found that if a Jackson-Denno hearing had been held, the defendant's statements would have been found admissible, notwithstanding that the defendant was a minor. *Cuvas v. State*, 306 Ga. App. 679, 703 S.E.2d 116 (2010).

**Ineffective counsel not established.**

Defendant's ineffective assistance of counsel claims lacked merit, given that: (1) similar transaction testimony was cumulative of other testimony previously offered, admitted for the proper purpose of showing a prior difficulty between the defendant and one of the victims, and could have shown defendant's motive, intent, and bent of mind; and (2) the alleged improper character evidence was admissible to explain why the victims and their parents did not immediately report the matter to police. *Head v. State*, 285 Ga. App. 471, 646 S.E.2d 699 (2007).

Based on the transcript of the guilty plea hearing and the testimony by defense counsel at the hearing, the trial court was authorized to reject the defendant's claims that counsel's performance was deficient, that counsel was not prepared to try the case, and that counsel forced the defendant to enter a guilty plea. *Moore v. State*, 286 Ga. App. 99, 648 S.E.2d 451 (2007).

Defendant did not show ineffective assistance of counsel where, even if counsel's failure to attempt to exclude certain evidence was deficient, the defendant did not show that harm resulted; counsel was not ineffective for failing to object to admissible evidence that the defendant was hiding in a closet at the time of the defen-

dant's arrest, for failing to request an alibi charge when the evidence did not show the impossibility of the defendant's presence at the crime scene, and the defendant did not show how trial counsel's failure to introduce prior allegations of sexual abuse by the victim rendered trial counsel's performance deficient. *Foster v. State*, 286 Ga. App. 250, 649 S.E.2d 322 (2007), cert. dismissed, 2007 Ga. LEXIS 875 (Ga. 2007).

The defendant's claims of ineffective assistance of counsel were either waived or lacked merit; nowhere in a motion for new trial or in the hearing thereon had the defendant mentioned defense counsel's failure to object to a handgun, the evidence belied the defendant's assertion that defense counsel had given the defendant an insufficient explanation of a recidivist notice, and a certain charge the defendant claimed should have been requested would have been inappropriate in light of the evidence. *Winfrey v. State*, 286 Ga. App. 450, 649 S.E.2d 561 (2007).

Defendants' ineffective assistance of counsel claims failed where although defendants claimed that counsel was ineffective for failing to rebut testimony that a driver's death could not have prevented by a seat belt, defendants had not shown that such rebuttal evidence existed; counsel was also not ineffective for failing to seek a directed verdict of acquittal because the evidence was sufficient to support defendants' convictions, defendants were not prejudiced by counsel's failure to request a charge on proximate cause because there was no evidence that the driver's death could have been avoided by a seat belt, defendants by not questioning counsel's reasons for not requesting certain charges had not overcome the presumption that counsel acted reasonably, no curative need had arisen to give a charge on one defendant's right not to testify, and a Jackson-Denno hearing was not required because incriminating statements made by one defendant were not made during police interrogation, but to a nurse treating him at a hospital. *Mitchell v. State*, 282 Ga. 416, 651 S.E.2d 49 (2007).

Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as

counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, and comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. *Hampton v. State*, 282 Ga. 490, 651 S.E.2d 698 (2007).

A defendant failed to establish ineffective assistance of counsel; counsel's failure to object to hearsay testimony about a statement by a non-testifying witness was not ineffective assistance because the statement's admission was harmless error, the failure to object to hearsay testimony as to venue was not ineffective assistance because admissible evidence established venue, and the failure to make a chain of custody objection was not ineffective assistance because the objection would have been fruitless. *White v. State*, 283 Ga. 566, 662 S.E.2d 131 (2008).

A defendant had not shown that trial counsel was ineffective where the defendant had not identified any motion, defense, or evidence that counsel failed to present and had failed to show any deficiencies in counsel's knowledge of the crime scene that affected the outcome of the trial; the defendant had not cited any evidence that could have been used to impeach witnesses or suggested any questions that could have been asked and had not shown prejudice from counsel's failure to seek a continuance based on the absence of a prosecution witness. *Cail v. State*, 287 Ga. App. 547, 652 S.E.2d 190 (2007).

Having failed to demonstrate a reasonable likelihood that the outcome of defendant's trial would have been different had defendant testified, defendant had not established ineffective assistance of counsel. Defendant claimed at a motion for new trial hearing that defendant's spouse and stepchild had lied at defendant's trial, but did not allege any specific lie; furthermore, the record confirmed that the jurors were adequately charged that defendant was denying all charges and that witness

credibility was a question for them to decide. *Brown v. State*, 288 Ga. App. 671, 655 S.E.2d 287 (2007).

Defendant had not shown ineffective assistance of counsel because it was not unreasonable for counsel to allow defendant's statement to come into evidence, as it allowed counsel to place defendant's version of events before the jury without subjecting defendant to cross-examination; further, chain of custody objection would not have been meritorious, it was not improper for an officer to come to the defendant's house to investigate information received from an anonymous tip, it was highly probable that erroneous testimony did not contribute to the verdict, and defendant had not shown how further cross-examination of a certain witness would have produced a different result. *Felton v. State*, 283 Ga. 242, 657 S.E.2d 850 (2008).

Because an officer's testimony that the defendant was driving under the influence did not impermissibly invade the jury's province and because there was no reasonable probability that the language of a charge would confuse or mislead the jury, trial counsel was not ineffective for failing to object to the testimony and to the charge; furthermore, given the evidence against the defendant, there was no reasonable probability that the outcome of the trial would have been different had trial counsel objected to hypothetical questions posed to the defendant's character witness. *Karafiat v. State*, 290 Ga. App. 15, 658 S.E.2d 801 (2008).

Defendant had not shown ineffective assistance of counsel where, on a motion for a change of venue, defendant had not shown how live evidence or a citizen survey could have accomplished any more than the introduction in evidence of existing pretrial publicity or voir dire, and counsel's failure to prepare defendant for testimony before date of trial was not deficient performance because defendant did not indicate until the morning of trial that defendant wished to testify, defendant had not proffered evidence as to what a more thorough investigation would have uncovered, and Ga. Unif. Super. Ct. R. 31.3 did not entitle a defendant to evidentiary hearing with live witnesses to

determine the admissibility of similar transaction evidence. *Harvey v. State*, 284 Ga. 8, 660 S.E.2d 528 (2008).

A defendant who claimed that defense counsel failed to discuss “important issues” with the defendant, but who did not identify the issues in the defendant’s brief or testify at the new trial hearing about what might have been discussed, did not show ineffective assistance of counsel. Furthermore, counsel was not ineffective for failing to make objections that would have been fruitless. *Judkins v. State*, 282 Ga. 580, 652 S.E.2d 537 (2007).

A defendant in a burglary trial did not show ineffective assistance of counsel. A crowbar was admissible, and counsel’s objection to the crowbar’s admission would have been overruled; a nonresponsive answer by an officer that there was a warrant out for the defendant did not in itself place the defendant’s character into issue; and not requesting a lesser included charge on criminal trespass was a reasonable trial strategy as it would have been inconsistent with counsel’s trial theory that the defendant had been at the victim’s house to investigate suspicious noises, a lawful purpose. *Rudnitskas v. State*, 291 Ga. App. 685, 662 S.E.2d 729 (2008).

There was no merit to a defendant’s ineffective assistance of counsel claims. A motion to suppress incriminating letters would have been meritless because the defendant’s friend willingly handed the letters over to police and the letters were not discovered as a result of an illegal search; counsel did not have a witness testify because counsel did not believe that the witness was credible; and given the fact that the defendant would have been subject to extensive and potentially damaging cross-examination about the letters had the defendant testified, counsel was not deficient in advising the defendant not to testify and the defendant had not been prejudiced by not testifying. *Lockheart v. State*, 284 Ga. 78, 663 S.E.2d 213 (2008).

Trial court properly denied the defendant’s motion to withdraw a guilty plea when the defendant claimed that trial counsel was ineffective by misinforming the defendant that the sentence would

run concurrently with any imposed by Tennessee for a parole violation and that the sentence would be served in Tennessee. The trial court was entitled to give credit to testimony from trial counsel and documents indicating that the defendant’s Tennessee sentence was indeed running concurrently with the Georgia sentence; it was also entitled to credit trial counsel’s testimony that counsel had informed the defendant that the sentence would be served in Georgia unless Tennessee authorities extradited the defendant to Tennessee and that counsel had made no guarantees that they would do so. *Maples v. State*, 293 Ga. App. 232, 666 S.E.2d 609 (2008).

Defendant did not show prejudice from trial counsel’s failure to ensure transcription of a similar transaction hearing. The defendant did not show that the hearing transcript was necessary to resolve any issue on appeal; any error with respect to the admission of the similar transaction evidence could be resolved on the basis of the record at trial. *Robinson v. State*, 293 Ga. App. 238, 666 S.E.2d 615 (2008).

Defense counsel was not deficient for failing to object to an officer’s testimony that while violently resisting arrest, the defendant repeatedly screamed, “I’m not going back to jail,” as evidence of these statements demonstrated the defendant’s intent to commit the crimes of obstructing and hindering law enforcement officers, and were not rendered inadmissible merely because the statements incidentally put the defendant’s character at issue. *Bubrick v. State*, 293 Ga. App. 502, 667 S.E.2d 666 (2008).

Defendant did not show ineffective assistance of counsel when there was no evidence that recusal of the trial judge was warranted and there was no evidentiary support for the defendant’s claim that trial counsel did not adequately involve the defendant in the pretrial and trial proceedings. Furthermore, the defendant did not show how the alleged deficiencies would have affected the outcome of the trial. *Allen v. State*, 284 Ga. 310, 667 S.E.2d 54 (2008).

Defendant did not show that counsel was ineffective as the trial court found that if a witness that counsel failed to

locate testified, the testimony would not have been helpful in light of the witness's demeanor and credibility problems; counsel made a good faith effort to find another witness but had limited information about the witness; counsel's failure to timely notify the state of a witness's testimony was not prejudicial because the testimony would not have been helpful to the defendant and would not have been admissible at trial; and counsel was not ineffective for requesting charges on both accident and self-defense because both were warranted. *Hudson v. State*, 284 Ga. 595, 669 S.E.2d 94 (2008).

Since both the defendant and the ex-wife testified that they had a phone conversation on the day of the stalking and burglary incident, but disagreed as to what was said in the conversation, and the defendant's cell phone records would not have reflected the substance of the conversation, the admission of the records would have had no impact on the issue of credibility, and the failure of defense counsel to obtain the phone records did not amount to ineffective assistance. *Bray v. State*, 294 Ga. App. 562, 669 S.E.2d 509 (2008).

Trial counsel was not ineffective for failing to conduct a more extensive cross-examination of a codefendant as counsel testified that counsel did not consider the codefendant to be a believable witness, the weight of the evidence was clearly against the codefendant, and counsel's strategy was to try to keep the defendant in the background and avoid responsibility for the crimes. *Freeman v. State*, 284 Ga. 830, 672 S.E.2d 644 (2009).

Defendant's ineffective assistance of counsel claim based on counsel's failure to strike a juror and to make certain objections failed. The juror stated that the juror did not think the juror would be biased against the defendant and would try to base the juror's decision solely on the evidence; incriminating statements by the defendant were admissible as an exception to the hearsay rule as admissions against interest; a physician who testified that the victim's demeanor was consistent with that of a sexual assault victim was not bolstering the victim's testimony; even if trial counsel erred in failing to object to

the prosecutor's statement that trial counsel should make the defendant show the defendant's teeth, no prejudice was shown given counsel's rebuttal in closing and the significant evidence of guilt; and the prosecutor was not offering the prosecutor's personal belief about the veracity of an eyewitness and the victim, but instead was arguing that based on the facts and reasonable inferences drawn therefrom, the jury should conclude that those witnesses were telling the truth. *Brown v. State*, 293 Ga. App. 564, 667 S.E.2d 410 (2008).

There was no ineffectiveness of the defendant's trial counsel for failing to object to questions posed to a codefendant and for failing to object to the prosecutor's closing argument as the testimony and comments by the prosecutor did not suggest to the jury that the defendant was unable to produce an alibi witness; further, the questions were proper, as were the prosecutor's remarks. *Hung v. State*, 284 Ga. 796, 671 S.E.2d 811 (2009).

Defendant, who sought to withdraw a guilty plea, failed to show that counsel was ineffective for failing to introduce at a Jackson-Denno hearing evidence of the defendant's mental health evaluations; thus, the defendant's motion to withdraw the plea was properly denied. The evaluations were not yet available at the time of the hearing, and neither addressed the issue of the defendant's competence at the time the defendant gave the incriminating statement. *Robertson v. State*, 297 Ga. App. 228, 676 S.E.2d 871 (2009), cert. denied, No. S09C1300, 2009 Ga. LEXIS 406 (Ga. 2009).

There was no showing that the defendant's counsel was ineffective at the defendant's criminal trial as counsel sought bifurcation of a felony murder charge, and seeking severance of a firearm possession charge was not warranted because it was the underlying felony for the felony murder charge. Additionally, counsel's failure to seek a limiting instruction in regard to the defendant's prior conviction did not constitute deficient performance since there was no showing that the outcome of the trial would have been different but for the deficiency. *Varner v. State*, 285 Ga. 300, 676 S.E.2d 189 (2009).

Trial court did not clearly err in rejecting the defendant's claim that trial counsel rendered ineffective assistance by failing to locate, interview, and secure a witness's presence at trial because the trial court was authorized to conclude from trial counsel's testimony that the defendant rejected the defendant's offer to hire an investigator and that counsel made reasonable efforts to locate the witness and to establish an alibi defense; moreover, based on the inconsistencies in the statements of the defendant and family members regarding the alibi, and the credibility issues regarding the alibi witness, counsel made a reasonable strategic decision to withdraw the alibi defense. *Ransom v. State*, 297 Ga. App. 902, 678 S.E.2d 574 (2009).

There was no showing of ineffective assistance in counsel's failure to pursue a justification defense pursuant to O.C.G.A. § 16-3-21(a) because, although the defendant claimed that the defendant shot the victim to protect the defendant's father, inter alia, the facts did not show that the father was in imminent danger, and the victim's threat against the father was made 30 minutes before the fatal shooting; at the time of the shooting, both men had fought in the street outside the father's home, the father was inside the home and not with them, and the victim was running away from the defendant. Even if the victim, who may have been carrying a knife, was going towards the father's house, the victim was shot before reaching the front yard. *Carter v. State*, 285 Ga. 565, 678 S.E.2d 909 (2009).

Although the defendant claimed that defense counsel failed to adequately investigate the victim's prior difficulties or bad acts and failed to investigate whether any toxicology reports relating to the victim would have bolstered the defendant's self-defense claim, because the defendant failed to specify what evidence counsel could have presented that would have changed the result of the trial, the defendant failed to establish that defense counsel's actions were deficient; in any event, because of the overwhelming evidence of guilt, the defendant would have been unable to show that, but for this claimed deficient performance, the jury would

have reached a different verdict. *Buggle v. State*, 299 Ga. App. 515, 683 S.E.2d 85 (2009).

Defendant did not show that trial counsel was ineffective. Defense counsel's failure to object to hearsay because counsel knew that the statements would be corroborated by the defendant's testimony later in the trial was trial strategy; counsel's failure to object to statements that counsel thought would be admissible as part of the *res gestae* was reasonable trial strategy; counsel believed that certain testimony was not hearsay and would also work to the defendant's benefit; counsel chose not to object to prior consistent testimony of the victim because counsel believed that the testimony showed that some of the victim's testimony was inconsistent and thus would undermine the victim's credibility; and contrary to the defendant's contention, certain testimony did not show that the defendant had a prior criminal history. *Abernathy v. State*, 299 Ga. App. 897, 685 S.E.2d 734 (2009).

Trial counsel's deficient performance in failing to object to a jury charge was not prejudicial because the trial court admitted having erred and went on to conclude that the error was harmless in light of the overwhelming evidence of the defendant's guilt. *Higginbotham v. State*, 287 Ga. 187, 695 S.E.2d 210 (2010).

Trial counsel did not perform deficiently by failing to object to the trial court's instruction on possession of a firearm by a convicted felon when the defendant was charged with use of a firearm by a convicted felon because there was no need for counsel to object to the charge since the district attorney immediately advised the trial court of the error, and the jury was recalled and given instructions with regard to the crime as charged. *Higginbotham v. State*, 287 Ga. 187, 695 S.E.2d 210 (2010).

Trial counsel was not ineffective for failing to request a jury charge on immunity granted to a witness because the transcript revealed that the witness was questioned regarding the grant of immunity and was thoroughly cross-examined regarding the witness's motives for testifying; that questioning and the general jury instructions on witness credibility

that were given were sufficient to apprise the jury of any negative inferences the jury could draw from the immunity arrangement involving this witness. *Dockery v. State*, 287 Ga. 275, 695 S.E.2d 599 (2010).

Trial counsel did not “open the door” to bad character evidence by stating that the evidence would show that the victim previously stole the defendant’s cash and marijuana because evidence concerning the victim’s transaction with the defendant and the defendant’s subsequent suspicion that the victim stole the defendant’s marijuana and money was admissible as evidence of prior difficulties between the two and was relevant to show the defendant’s motives. *Taylor v. State*, 304 Ga. App. 395, 696 S.E.2d 686 (2010).

Trial counsel was not ineffective for failing to adequately prepare for trial because although the defendant contended that counsel was unaware of defendant’s preferred trial strategy since counsel only met with the defendant two times before trial, the trial court credited counsel’s testimony and found that counsel did, in fact, discuss counsel’s trial strategy with the defendant; the defendant did not further elaborate on how counsel was allegedly unprepared for trial. *Sheats v. State*, 305 Ga. App. 475, 699 S.E.2d 798 (2010).

Defendant failed to establish ineffective assistance of trial counsel because assuming that trial counsel’s failure to obtain and review the actual recording of the defendant’s statement to the police constituted deficient performance, the defendant did not show that the defendant was prejudiced thereby; trial counsel testified that counsel cross-examined the officer who took the defendant’s statement based on notes from counsel’s discussions with the defendant, counsel’s investigator, the officer’s report, and the officer’s direct testimony. *Cuvas v. State*, 306 Ga. App. 679, 703 S.E.2d 116 (2010).

Trial counsel was not ineffective for failing to object when the trial court denied the jury’s request for a transcript of the testimony given by a victim because the trial court was authorized to deny the jury’s request; the jury did not specify any portion of the victim’s testimony that the jury wanted to rehear but rather asked for

a copy of all of the victim’s testimony, and the record did not reflect that there was a serious disagreement as to the substance of the victim’s testimony or that the testimony had been misstated during the course of trial. *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

Defendant failed to show that the defendant was prejudiced due to trial counsel’s failure to review the redacted version of a recording of the defendant’s police interview and to object to the recording because the defendant did not show a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel’s unprofessional errors, the result of the proceeding would have been different; although the defendant argued that a reference concerning “illegal use of prescription drugs” was prejudicial character evidence, no mention was made in the interview of whether the defendant had been prescribed the drug or was consuming the drug illegally. *Eskew v. State*, 309 Ga. App. 44, 709 S.E.2d 893 (2011).

Because the trial court did not abuse the court’s discretion in refusing to grant the defendant a continuance due to the untimeliness of the state’s witness list, and because any error was harmless, the defendant could not succeed on the claim that the defendant’s right to effective trial counsel was violated thereby; the defendant’s claim did not require application of a presumption of prejudice, which was applicable only in extremely narrow circumstances. *Norris v. State*, 289 Ga. 154, 709 S.E.2d 792 (2011).

Defendant’s trial counsel was not ineffective for requesting the pattern jury instruction that included a witness’s degree of certainty as a factor the jury could consider in assessing the reliability of a witness’s identification testimony because the defendant failed to show that the defendant was prejudiced by the request, given the other evidence linking the defendant to the crimes, including the defendant’s possession of a victim’s cell phone and a revolver matching the description of the one used in all three robberies. *Willis v. State*, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Because there was no error in the trial court's instruction to the jury, trial counsel was not ineffective for failing to object. *Holland v. State*, 310 Ga. App. 623, 714 S.E.2d 126 (2011).

Trial counsel's failure to seek admission of a detective's notes reflecting that the defendant was scared of the victim under the rule of completeness did not support a finding of ineffective assistance of counsel because the defendant could not show that such was professionally deficient or prejudicial. *Payne v. State*, 289 Ga. 691, 715 S.E.2d 104 (2011).

Defendant's contention that defense counsel was ineffective for failing to preserve objections for appellate review by renewing all objections at the end of trial asserted an issue that was not the law in Georgia; having made a timely and proper objection, counsel is not required to renew counsel's objections at the close of the case to preserve the issues for appellate review. *Sledge v. State*, 312 Ga. App. 97, 717 S.E.2d 682 (2011).

Defendant failed to show that trial counsel was ineffective by failing to assert that the state's statutory and constitutional provisions requiring the service of mandatory minimum sentences before consideration for parole regardless of age constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution because any consideration for Eighth Amendment purposes of incomplete brain maturation due solely to age was inappropriate since the defendant was 20 years old at the time the defendant committed the crime and was sentenced to a term of years rather than death. *Gandy v. State*, 290 Ga. 166, 718 S.E.2d 287 (2011).

Defendant failed to show that trial counsel was ineffective by not arguing the rule of completeness, former O.C.G.A. § 24-3-38 (see now O.C.G.A. § 24-8-822), as a means to get the defendant's entire post-stabbing statement into evidence because there were discrepancies between the defendant's trial testimony and the account of a witness regarding a statement the defendant allegedly made on the night of the stabbing; therefore, an acquittal would not likely have resulted had the jury heard the witness's testimony in its

entirety. *Carruth v. State*, 290 Ga. 342, 721 S.E.2d 80 (2012).

Defendant did not receive ineffective assistance of counsel due to counsel's consent to bond conditions because although counsel testified at the new trial hearing, the defendant did not question counsel as to whether counsel actually consented to the bond conditions; the defendant did not show a reasonable likelihood that without counsel's consent the bond conditions would have been less onerous. *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012), cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Defendant was not constructively denied counsel due to the strained relationship with the defendant's appointed attorney because trial counsel subjected the prosecution's case to meaningful adversarial testing, including cross-examining the state's witnesses, moving for a directed verdict, and making a closing argument on defendant's behalf. *Calloway v. State*, 313 Ga. App. 708, 722 S.E.2d 422 (2012).

Trial counsel was not ineffective for failing to bring errors in the jury charges to the trial court's attention because the complained of jury charges were proper, and trial counsel's conduct fell well within the broad range of reasonable professional conduct; there is no reasonable likelihood of a different outcome had trial counsel raised the arguments the defendant asserted counsel should have raised. *Davis v. State*, 290 Ga. 757, 725 S.E.2d 280 (2012).

Counsel was not ineffective for introducing in evidence the defendant's videotaped statement to police without redacting portions after the defendant invoked the right to counsel and asked God to have mercy on the defendant's soul, as it did not amount to an improper comment on the right to remain silent, but showed invocation of the right to counsel after giving a lengthy statement. *Martin v. State*, 290 Ga. 901, 725 S.E.2d 313 (2012).

Trial court did not err in denying defendant's motion for a new trial because counsel's practice of not requesting a transcription of voir dire or opening and closing arguments was within the broad

range of professional conduct afforded to trial counsel in a non-death penalty case. *Dunlap v. State*, 291 Ga. 51, 727 S.E.2d 468 (2012).

Defense counsel was not ineffective in stipulating to negative scientific test results because the test results were not inconsistent with the defendant's defense. *Chance v. State*, 291 Ga. 241, 728 S.E.2d 635 (2012).

Defendant, who was convicted of statutory rape, failed to show ineffective assistance of counsel because of defense counsel's failure to assert that the door had been opened to evidence of the victim's deceit regarding the victim's age as counsel testified that counsel did not hear or see any evidence that opened the door regarding the victim's deceit about the victim's age and that counsel found many of the questions to be helpful to the defense strategy of showing the victim was the one who pursued the defendant. Also, the transcript showed that the state did not introduce any direct evidence to open the door about the victim's deceit regarding the victim's age. *Baker v. State*, 316 Ga. App. 122, 728 S.E.2d 767 (2012).

Trial counsel was not ineffective by failing to introduce evidence of the age difference between the defendant and the accomplice as the defendant had not shown that there was a reasonable likelihood that but for trial counsel's failure to elicit additional, non-specific evidence regarding the age disparity between the defendant and the accomplice, the outcome of the trial would have been different. Trial counsel revealed at the motion for new trial hearing that the jury should have been able to observe at trial the obvious age disparity between the two. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

Trial counsel was not ineffective by failing to object to hearsay testimony provided by the defendant's accomplice as the hearsay was only cumulative of the accomplice's own admissible testimony describing the defendant as having shot the victim in the back of the head and that the defendant gave money to the accomplice shortly after the murder. The admission of cumulative hearsay evidence was error, and the defendant could not show that,

but for trial counsel's failure to object to such evidence, the outcome of the trial would have been different. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

Trial counsel's failure to produce evidence of the layout of the defendant's home did not constitute ineffective assistance as the defense theory was that the accomplice was fully responsible for the crimes and that the defendant was not even present at the time of the murder. Moreover, the defendant could not make a showing of prejudice as the layout of the home would not have refuted the accomplice's testimony. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

Trial counsel was not ineffective in failing to present evidence regarding the origin of the blanket in which the victim's body was wrapped to refute the testimony of the defendant's accomplice that the blanket had been taken from the laundry bin at the defendant's home as trial counsel did, in fact, elicit testimony confirming the lack of any forensic evidence connecting the defendant to the murder. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

Trial counsel was not ineffective in failing to present a police photograph showing the absence of computer equipment in the defendant's bedroom to refute the testimony of the defendant's accomplice that the victim was in the defendant's bedroom looking at computer merchandise while the defendant pulled out a gun to shoot the victim. Since the defendant did not make a showing that computer equipment was not contained in a part of the defendant's bedroom that was not depicted in the picture, the defendant could not demonstrate that there was a reasonable probability that the outcome of the trial would have been different had trial counsel taken the suggested course. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

Trial court did not err in finding that the defendant failed to establish an ineffectiveness claim because counsel recognized the need for interpreters and secured the interpreters to communicate with the defendant during their meetings and throughout the court proceedings; the defendant had ample opportunity to inform counsel or the trial court of any

problems with the interpreters but did not do so. *Cruz v. State*, 315 Ga. App. 843, 729 S.E.2d 9 (2012).

Trial counsel's objections to similar transaction evidence were sufficient to raise the issue of whether the evidence showed a propensity for violence regardless of whether counsel used the word "propensity"; trial counsel was not ineffective for failing to make a meritless objection; trial counsel excepted to the trial court's denial of a motion for mistrial and thus preserved the issue for review; trial counsel was not deficient for failing to object to the state's cross-examination of the defendant because the state was permitted to ask the defendant about a similar transaction; counsel's asking a witness whether the witness was a legal alien was a matter of trial strategy; and the defendant had not shown that counsel could have challenged the validity of a guilty plea used to enhance the defendant's sentence. *Dunham v. State*, 315 Ga. App. 901, 729 S.E.2d 45 (2012).

Counsel testified that counsel failed to make certain objections during opening and closing and in regard to witness bolstering for strategic reasons and that counsel decided after extensive discussion not to call the defendant as a witness because counsel believed the potential downside was overwhelming. *Rawls v. State*, 315 Ga. App. 891, 730 S.E.2d 1 (2012).

Defendant could not establish that the defendant's attorney was deficient for failing to object to the testimony by a certified real estate and tax appraiser because the testimony by the witness regarding building permits was not opinion testimony, but was factual testimony about how structural engineering reports and architectural plans figured into the building permitting process and about the inspections required in connection with a building permit obtained with such documents. The defendant did not demonstrate that the witness rendered any opinion regarding the building permit in the defendants' case. *Wilson v. State*, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

Defendant's counsel was not ineffective for failing to object to the trial court's jury instructions on similar transaction evi-

dence that was admitted, although the trial court made a slip of the tongue during the instructions, as correct comprehensive limiting instructions were given to the jury during the trial; accordingly, any error was harmless. *Boynton v. State*, 317 Ga. App. 446, 730 S.E.2d 738 (2012), cert. denied, No. S13C0017, 2013 Ga. LEXIS 88 (Ga. 2013).

Trial counsel rendered ineffective assistance of counsel by failing to object to a probation officer's testimony as to the identity of the perpetrator because the testimony of the probation officer was not based on any distinctive observation about the defendant and the error was not harmless since the other evidence tending to identify the defendant as the perpetrator was limited to the brief testimony of the law enforcement officer, a recording of a jail house telephone call in which the defendant spoke to the defendant's roommate about how the defendant's roommate had "pulled one," and the similarities between the defendant's shoes and those worn by the perpetrator. However, no scientific evidence definitively linked the defendant to the crimes. *Owens v. State*, 317 Ga. App. 821, 733 S.E.2d 16 (2012).

Claim that trial counsel was ineffective for failing to renew the defendant's motion for mistrial, failing to conduct a proper examination of the victim in support of his motion for mistrial, and failing to request a limiting jury instruction contemporaneously with the admission of testimony regarding prior difficulties between the defendant and the victim failed, as the defendant could not show prejudice from any of the claimed deficiencies. *Hernandez v. State*, 317 Ga. App. 845, 733 S.E.2d 30 (2012).

Claim of ineffective assistance of counsel failed, as counsel strategically decided not to object to the prosecutor's misstatement of testimony and instead comment on the misrepresented statement when given the next opportunity and there were no insufficiencies in the affidavit supporting the search warrant to justify the filing of a motion to suppress. *Lopez-Jimenez v. State*, 317 Ga. App. 868, 733 S.E.2d 42 (2012).

Trial counsel did not render ineffective

assistance by failing to object to alleged prosecutorial misconduct, the prosecutors questioning of the defendant upon the defendant's post-arrest silence, as any objection would have been overruled, since the defendant opened the door to that line of questioning, and counsel could not be ineffective for failing to make a meritless objection. *Doyle v. State*, 291 Ga. 729, 733 S.E.2d 290 (2012).

Trial counsel was not ineffective for failing to object to the prosecutor's statement's about the victims' credibility, because the prosecutor did not improperly bolster the victim's credibility when the prosecutor asked the victim if the victim was telling the truth each time the victim recounted the rape and why the victim did not immediately call police, as the questions came after defense counsel attempted to impeach the victim's credibility. *Jones v. State*, 318 Ga. App. 342, 733 S.E.2d 400 (2012).

Claim of ineffective assistance of counsel failed as counsel presented mitigation witnesses and conducted a reasonable investigation as to mitigating circumstances to present at sentencing; counsel was not ineffective for failing to develop and present evidence of the victim's methamphetamine use at the time of the crimes to explain the victim's behavior, because the only evidence of such use was from two to three days prior to the incident, and thus, would have been irrelevant and inadmissible; counsel was not ineffective for failing to present the testimony of the victim's girlfriend regarding a recent altercation between the victim and the victim's cousin, as the girlfriend testified at the motion for a new trial that no such fight occurred, only a scuffle in which the victim was not hit. *Barrett v. State*, 292 Ga. 160, 733 S.E.2d 304 (2012).

As the defendant had decided to turn himself in and had already revealed to a law enforcement officer that the defendant had killed the victim, claiming self defense, and that the defendant had attempted to conceal the body, trial counsel's decision to permit the defendant to cooperate in the interrogations and searches did not amount to ineffective assistance of counsel. *Woods v. State*, 291 Ga. 804, 733 S.E.2d 730 (2012).

Defendant's claim that trial counsel was ineffective for failing to convey a plea offer failed, because an informal offer was discussed with the defendant, who rejected the possibility. *Brown v. State*, 291 Ga. 892, 734 S.E.2d 23 (2012).

Defendant failed to show deficient performance on the part of defense counsel as defense counsel testified that defense counsel correctly advised the defendant that the defendant would not be eligible for parole until the defendant served 30 years of the life sentence and did not tell the defendant that the defendant could withdraw the plea at any time, testimony which the trial court credited. *Arnold v. State*, 292 Ga. 95, 734 S.E.2d 382 (2012).

Trial counsel was not ineffective for failing to object to relevant and admissible evidence, failing to object to testimony that was supported by the evidence, or failing to make a meritless motion to exclude evidence. *Thomas v. State*, 318 Ga. App. 849, 734 S.E.2d 823 (2012).

Trial counsel's decision not to recall the victim to the stand to discuss the victim's provocative behavior did not amount to ineffective assistance of counsel but was a strategic decision so as to ensure that counsel did not violate the former Rape Shield Statute, former O.C.G.A. § 24-2-3 (see now O.C.G.A. § 24-4-412). *Whorton v. State*, 318 Ga. App. 885, 735 S.E.2d 7 (2012).

Defendant's claim of ineffective assistance of counsel based on the failure to object to an officer's testimony that the officer believed a rape had occurred failed because the defendant could not prove the outcome would have otherwise been different given the overwhelming evidence against the defendant. *Osei-Owusu v. State*, 319 Ga. App. 33, 735 S.E.2d 75 (2012).

While trial counsel testified that the failure to object or move for mistrial when an officer testified that the defendant and an accomplice were arrested for, inter alia, being a convicted felon with a weapon was not part of counsel's strategy, the reference was passing and equivocal and the defendant could not establish it placed the defendant's character in evidence, nor was the defendant charged with that offense. *Toro v. State*, 319 Ga. App. 39, 735 S.E.2d 80 (2012).

Trial counsel's failure to convince the trial court to admit statements about the involvement of others and failure to make objection to the admission of a recorded statement did not amount to ineffective assistance because the arguments and objections sought were meritless. *Bradley v. State*, No. S12A1857, 2013 Ga. LEXIS 259 (Mar. 18, 2013).

Defendant failed to prove that trial counsel was ineffective for failing to give timely notice to the state of a surprise witness who was precluded from testifying because the defendant failed to present testimony at the hearing on the motion for a new trial as to what the witness would have testified to. *Jones v. State*, 292 Ga. 593, No. S12A1759, 2013 Ga. LEXIS 260 (2013).

Trial counsel was not ineffective for failing to offer a "timeline" to show that the defendant's girlfriend delayed taking the victim to the hospital because the girlfriend never provided exact times in her testimony and nothing indicated that any delay in seeking medical treatment contributed to the victim's death. *Jones v. State*, 292 Ga. 593, No. S12A1759, 2013 Ga. LEXIS 260 (2013).

Even assuming counsel's failure to serve a detective with a subpoena and inability to admit evidence of the detective's report and interview fell below prevailing professional norms, no reasonable probability existed that the jury would have returned a verdict of not guilty as evidence covering the same issues the defendant sought to cover with the detective was admitted. *Goodwin v. State*, No. A12A1762, 2013 Ga. App. LEXIS 164 (Mar. 11, 2013).

Defense counsel was not ineffective for failing to object to statements that have previously been held to be within the bounds of possible argument, for failing to object to statements the prosecution used to argue motive, or for failing to object to the prosecutor's statement which urged the jury to draw inferences that an alibi witness lied from the circumstances. *Wright v. State*, 319 Ga. App. 723, 738 S.E.2d 310 (2013).

Trial counsel's failure to elicit testimony that an officer retrieved a shotgun from the victim's house did not prejudice the

defense because the victim testified that the victim had a shotgun and the jury could not have reasonably believed there was no shotgun; thus, the defendant was unable to show that the jury's weighing of evidence of the defendant's self-defense claim would have resulted in a different outcome. *Williams v. State*, 319 Ga. App. 827, 738 S.E.2d 637 (2013).

Defense counsel was not ineffective for failing to move to redact the portion of the autopsy report that said the manner of death was homicide because it was undisputed that the victim was killed by someone and the ultimate issue for the jury was whether the defendant was the killer. *Young v. State*, 292 Ga. 443, 738 S.E.2d 575 (2013).

Trial counsel was not ineffective for failing to object to the admission of several hundred pages of time sheets from employees because counsel testified that a substantive objection was not made because counsel believed that the time sheets were helpful and use of a reasonably informed trial strategy could not support a claim of ineffective assistance of counsel. *Brown v. State*, No. A12A2308, 2013 Ga. App. LEXIS 228 (Mar. 20, 2013).

Trial counsel was not ineffective for failing to object to a reference by a witness to an email sent by a deceased ex-employee that was consistent with an email sent by an employee alerting general counsel to the defendant's improper acts at work because the brief reference was cumulative of other evidence. *Brown v. State*, No. A12A2308, 2013 Ga. App. LEXIS 228 (Mar. 20, 2013).

Defense counsel could not have been ineffective for failing to demand the trial court extend use immunity to a defense witness who invoked the Fifth Amendment right to remain silent as there was not current Georgia authority for such action. *Ward v. State*, No. S13A0420, 2013 Ga. LEXIS 266 (Mar. 18, 2013).

Counsel was not ineffective for failing to advocate for the defendant to have makeup, a wig, and personal grooming tools to enable the defendant to look nicer at trial because it was a reasonable trial strategy for counsel to want to present the defendant in a way that made the defendant looked like a psychologically de-

feated and traumatized young woman who had been victimized by an abusive and violent husband. *Schutt v. State*, No. S12A2060, 2013 Ga. LEXIS 263 (Mar. 18, 2013).

Trial counsel was not ineffective for failing to object to the investigator's statement at trial that the investigator took out a warrant against the defendant for burglary in addition to the charges in the case, given that the statement was brief and five witnesses identified the defendant as the assailant in the subject incidents. *Riley v. State*, 319 Ga. App. 823, 738 S.E.2d 659 (2013).

Defendant failed to establish that trial counsel's decision to question a witness about changes in the defendant's appearance rather than object to the state's evidence on that point was a decision that no reasonable trial counsel would make under the circumstances of the case; to the contrary, counsel's attempts to explain the defendant's appearance through the questioning of witnesses suggested that counsel made a strategic decision about how to handle the state's evidence about the defendant's appearance. *Bufford v. State*, 320 Ga. App. 123, 739 S.E.2d 421 (2013).

Defendant's claim of ineffective assistance of counsel failed because the defendant failed to show either professional deficiencies by counsel or prejudice in regard to the defendant's complaints about a jury instruction on "no duty to retreat," the alleged criminal history of a witness, and the detective's alleged bolstering of a witness's testimony, claims for which the Georgia Supreme Court found no support. *Hoffler v. State*, 292 Ga. 537, 739 S.E.2d 362 (2013).

**Acquittal on serious offenses meant no ineffective assistance.** — Trial counsel was not ineffective in failing to investigate a detective's note regarding the statement of the county medical examiner that the gunshot wound to the victim's head was consistent with the victim being shot while the victim was on the victim's knees. The defendant could not demonstrate prejudice as the defendant was acquitted on the charges of murder and felony murder. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

**Failure to visit defendant in jail not ineffective assistance.** — Trial counsel

was not ineffective based on counsel's failure to come to a jail to confer with a defendant in jail after the defendant's bond was revoked mid-trial; counsel had conferred with the defendant numerous times and was in constant touch with the defendant before the bond was revoked, counsel filed numerous pretrial motions, and counsel obtained acquittals for the defendant on two of the eight charges originally alleged in an indictment. *Branton v. State*, 292 Ga. App. 104, 663 S.E.2d 414 (2008), cert. denied, No. S08C1771, 2008 Ga. LEXIS 873 (Ga. 2008).

Defendant presented no information to show a reasonable probability that the outcome of the trial would have been different had counsel acted otherwise because by the defendant's own admission, the defendant met with trial counsel "just about as much as anybody would want to meet with their attorney," or perhaps ten or twelve times prior to trial; trial counsel testified that counsel went over the evidence with the defendant numerous times and discussed strategy and that the defendant relied on counsel's advice and decided not to testify. *Neal v. State*, 308 Ga. App. 551, 707 S.E.2d 503 (2011).

**Pro se defendant cannot raise ineffective assistance claim as to issues arising during trial.** — Because the defendant proceeded pro se at trial, the defendant could not raise an ineffective assistance of counsel claim with regard to issues that arose during trial. *Fields v. State*, 310 Ga. App. 455, 714 S.E.2d 45 (2011).

#### **Absence of prejudice.**

With regard to a defendant's convictions for malice murder and other crimes, the trial court properly denied the defendant's motion for a new trial with regard to the assertions by the defendant that the defendant received ineffective assistance of counsel because the defendant failed to show that but for trial counsel's alleged failure to put greater emphasis on certain telephone cell phone record anomalies, the outcome of the defendant's trial would have been different. *Culmer v. State*, 282 Ga. 330, 647 S.E.2d 30 (2007).

Defendant did not establish ineffective assistance of counsel based on defense

counsel's failing to object to an expert's testimony that in the expert's opinion, the victim had not confused sexual acts by the victim's mother with the sexual acts that the defendant was alleged to have committed; even if a reasonable juror could have interpreted the expert's testimony as an impermissible affirmation of the victim's credibility, the limiting instruction and jury charge made it clear that the jury need not accept any opinions provided by the expert, and thus it was not reasonable to conclude that but for the inclusion of this testimony, the result of the trial would have been different. *Brooks v. State*, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

Trial counsel was not ineffective as: (1) the defendant failed to support an assertion that trial counsel was ineffective in failing to listen to an audiotape of the defendant's second interview with the Georgia Bureau of Investigation prior to trial; (2) counsel's off-hand comment as to hindsight was insufficient to support an inference of deficient performance; and (3) the defendant failed to show that prejudice resulted from counsel's alleged deficiency. *Sturgis v. State*, 282 Ga. 88, 646 S.E.2d 233 (2007).

Even if trial counsel was ineffective for failing to challenge the jury array on the basis that the array was tainted by the comments of a juror who was excused after stating that the juror thought the defendant was "guilty in 2003," when the crimes occurred, there was no prejudice because the juror's opinion was based solely on media reports, not on any personal knowledge of the defendant; where a prospective juror's comments did not link a defendant with criminal activity, or characterize the defendant as a criminal, the entire jury panel did not have to be excused. *Edwards v. State*, 282 Ga. 259, 646 S.E.2d 663 (2007).

A defendant's ineffective assistance claim failed; even if trial counsel were ineffective for failing to interview witnesses, the defendant did not show how any witness's testimony would have changed if trial counsel interviewed the witness such that the interviewing would have affected the outcome of the trial. *Ojemuyiwa v. State*, 285 Ga. App. 617, 647 S.E.2d 598 (2007).

Even if trial counsel was deficient in failing to pursue a defense related to the defendant's mental status, the defendant failed to present evidence showing that the defense was available to the defendant; as a result, the defendant failed to show that a reasonable probability existed that the outcome would have been different but for any deficient performance of trial counsel in failing to pursue a mental health defense. *Garza v. State*, 285 Ga. App. 902, 648 S.E.2d 84 (2007), vacated, in part, 300 Ga. App. 352, 685 S.E.2d 366 (2009).

A DUI defendant who claimed that counsel was ineffective for not obtaining a complete computer-aided dispatch report had not shown that the result would have been different with the report and thus had not shown prejudice; even if an officer had an illegal basis for stopping the defendant, attempting to flee was a separate crime that essentially purged the taint of the otherwise allegedly illegal stop. *Francis v. State*, 287 Ga. App. 428, 651 S.E.2d 779 (2007).

The defendant had not shown prejudice by trial counsel's failure to object to the "level of certainty" language in a charge, which had been disapproved of after the defendant's trial; the language was harmless because the identification testimony did not directly implicate the defendant and because other evidence tied the defendant to the robbery in question. *Rabie v. State*, 286 Ga. App. 684, 649 S.E.2d 868 (2007), cert. denied, 2008 Ga. LEXIS 96 (Ga. 2008).

Because there was significant evidence refuting the defendant's claim of self-defense, the defendant had not shown prejudice even if trial counsel was deficient for failing to object to the prosecutor's comment on the defendant's silence, for failing to object to the prosecutor's comment in opening about the evidence the defendant was anticipated to present at trial, and for failing to object to an alleged "golden rule" argument. *Jackson v. State*, 282 Ga. 494, 651 S.E.2d 702 (2007).

Because any deficiency in counsel's failure to object to an investigator's testimony regarding the hearsay statements of an informant did not prejudice the defendant's defense, the jury was likely to de-

duce that the defendant was on parole from the fact that a parole officer initiated a search, and pretermittting whether the defendant's response to the investigator's request to search constituted "pre-arrest silence," no deficiency existed in counsel's reasonable strategic decision that the evidence was consistent with the defense, the defendant's ineffective assistance of counsel claims lacked merit. *Cauley v. State*, 287 Ga. App. 701, 652 S.E.2d 586 (2007).

Because a felony murder conviction merged with a malice murder conviction, the defendant had not shown prejudice from trial counsel's failure to object to the felony murder jury charge; furthermore, defendant had not shown prejudice by the making of a statement that was not introduced at trial. *John v. State*, 282 Ga. 792, 653 S.E.2d 435 (2007).

Defendant argued that defense counsel was ineffective in cross-examining a state's witness and in failing to call a witness to undermine the testimony of the state's witness. The defendant failed to show prejudice; as eyewitnesses testified that the defendant ordered an aggravated assault on the victim and assisted in murdering the victim, any deficiencies of counsel were unlikely to have affected the verdict. *Wilcox v. State*, 284 Ga. 414, 667 S.E.2d 603 (2008).

Trial court did not err in rejecting the defendant's claim that trial counsel was ineffective for failing to seek to exclude the victim's in-court identification of the defendant as tainted by a previous identification because given the overwhelming evidence of the defendant's guilt, the defendant could not show a reasonable probability that the jury would have had a reasonable doubt respecting the defendant's guilt had the victim's identifications of the defendant been excluded; in the report to the police, the victim described the victim's car, which had been stolen, and the defendant, and when officers approached the car, the defendant immediately exited the vehicle and attempted to flee on foot. *Jackson v. State*, 309 Ga. App. 24, 709 S.E.2d 44 (2011).

Defendant did not receive ineffective assistance of counsel due to trial counsel's failure to object when a witness testified

that the defendant spent time with an alleged gang because there was no prejudice in light of the overwhelming evidence of the defendant's guilt; several other eyewitnesses testified that the defendant shot the victim, and the defendant failed to show that but for counsel's failure to object, the outcome of the trial would have been any different. *Kitchens v. State*, 289 Ga. 242, 710 S.E.2d 551 (2011).

Defendant did not receive ineffective assistance of counsel due to trial counsel's failure to object to an officer's characterizations of the defendant as a person who was "just violent" and had "a problem with sex" because even if an objection should have been made, the defendant could not show prejudice; given the defendant's admission regarding the defendant's violent temper and dissatisfaction with sex, as well as the significant evidence implicating the defendant in the crimes, the defendant could not demonstrate any likelihood that the outcome of the trial would have been different. *Dunson v. State*, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

Defendant failed to show ineffective assistance of counsel from the defendant's trial counsel having failed to object to the verdict form because even if the trial counsel had made a meritorious objection, there was no reasonable probability of a different outcome in the trial. *Darville v. State*, 289 Ga. 698, 715 S.E.2d 110 (2011).

Defendant could not meet the burden of demonstrating prejudice from trial counsel's request for an erroneous charge because the evidence presented against the defendant was strong; although trial counsel should not have requested a charge on prior consistent statements, the defendant could not demonstrate a reasonable probability that the outcome of the trial would have been different in the absence of the charge. Furthermore, defendant could not demonstrate prejudice from trial counsel's request for a witness credibility charge that allowed the jury to consider a witness's intelligence as one of several factors in assessing credibility because even assuming that the better practice was to omit intelligence as one of the factors in the credibility charge, the inclusion of credibility was not reversible error. *Bellamy v. State*, 312 Ga. App. 899, 720 S.E.2d 323 (2011).

**Effective assistance in involuntary intoxication defense case.** — The defendant’s trial counsel was not ineffective, as counsel’s investigation of the defendant’s involuntary intoxication defense was reasonable, even though it failed to lead to an expert competent to testify as to the defendant’s intoxication and potential effects of combining alcohol with a substance marketed as an over-the-counter “performance supplement.” *Knox v. State*, 290 Ga. App. 49, 658 S.E.2d 819 (2008).

**Failure to impeach police officer.** While the defendant waived any objection to the admission of similar transaction evidence without first requiring the state to present witness testimony at the hearing; and despite the fact that the trial court did not make the Williams findings on the record, no harmful error resulted from the admission of similar transaction evidence since the state’s evidence at the out-of-court hearing was sufficient for the trial court to conclude that each of the Williams requirements was satisfied. Thus, counsel could not be deemed ineffective in failing to object to the admission of the similar transaction evidence. *Hinton v. State*, 290 Ga. App. 479, 659 S.E.2d 841 (2008).

**Failure to object to bolstering.** — Defendant failed to prove that trial counsel was ineffective for failing to object to an investigator’s testimony allegedly bolstering testimony of the defendant’s girlfriend because there were several reasons a reasonably lawyer might not have objected, including not wanting to signal to the jury that defense counsel was worried about the testimony. *Jones v. State*, 292 Ga. 593, No. S12A1759, 2013 Ga. LEXIS 260 (2013).

**Failure to impeach victim.** — Trial counsel was not ineffective for failing to impeach the victim with felony convictions under former O.C.G.A. § 24-9-84.1 (see now O.C.G.A. § 24-6-609) because the defendant did not show that, but for counsel’s failure to introduce the victim’s earlier convictions, there was a reasonable probability that the outcome of the trial would have been different; the victim was referred to as “not trustworthy” and “a thief” during the trial, and the victim’s conviction for burglary was admitted and

referenced repeatedly during the trial. *Askew v. State*, 310 Ga. App. 746, 713 S.E.2d 925 (2011).

**Failure to object to admission of testimony strategic.** — Trial counsel’s decision not to object to the admission of testimony that the defendant was known as “kingpin” or “king of the strip” in order to use the drug culture surrounding the case to the defendant’s advantage was clearly strategic. *Hargrove v. State*, 291 Ga. 879, 734 S.E.2d 34 (2012).

**Failure to translate voir dire proceedings.** — Pretermittting whether trial counsel was deficient by failing to ensure that the defendant understood the voir dire proceedings by providing for proper translation, the defendant did not point to any specific harm due to the defendant’s alleged failure to understand the voir dire proceedings; therefore, the trial court did not clearly err in concluding that the defendant failed to show prejudice. It was undisputed that the defendant was present during voir dire, and the fact that the defendant may have “missed” some portion of the colloquy between counsel and 24 potential jurors did not compromise the right to be present on a constitutional scale. *Pineda v. State*, 297 Ga. App. 888, 678 S.E.2d 587 (2009).

**Striking of jurors.** — Trial counsel did not perform deficiently by failing to move to strike certain jurors for cause, despite expressing concerns about the jurors, because the record reflected that trial counsel, in fact, moved to strike the jurors in question and noted the trial court’s denial of the strikes for the record. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

**Ineffective counsel established.** The trial court did not abuse its discretion in granting the defendant a new trial based on the ineffective assistance of trial counsel, as: (1) counsel’s pretrial investigation was deficient; (2) counsel made no effort to investigate or to obtain the criminal records of the state’s similar transaction witness before trial, and did not ask for more time or a continuance upon learning that the defendant did not have the records; (3) the defendant pointed out that the jury had doubts about the victim’s testimony based on their verdict of guilt to sexual battery, as a lesser-included of-

fense of child molestation, the crime the defendant was charged with committing; (4) there was evidence that the victim had reason to lie; (5) the charged incident was not reported until after the defendant's wife hired a divorce lawyer, who then arranged the first interview between the victim and investigators; and (6) given that the evidence against the defendant was not overwhelming, this impeachment evidence was particularly crucial. *State v. Lamb*, 287 Ga. App. 389, 651 S.E.2d 504 (2007), overruled on other grounds, *O'Neal v. State*, 285 Ga. 361, 677 S.E.2d 90 (2009).

#### **Parental rights termination.**

Trial counsel was not ineffective for failing to object and move for a mistrial during closing argument when the prosecutor said that the jury had an opportunity to define what was acceptable in the community; read in context, the prosecutor appropriately urged the jury to speak on behalf of the community and rid the community of robbers and murderers. Furthermore, counsel was not ineffective because the defendant did not testify, as the evidence showed that counsel and the defendant discussed whether the defendant should testify, that counsel informed the defendant that the decision was the defendant's to make, and that the defendant decided not to testify. *Gibson v. State*, 283 Ga. 377, 659 S.E.2d 372 (2008).

**Counsel's error in phrasing question to defendant.** — Defense counsel erred by asking if the defendant previously had been “charged” with a crime instead of asking whether the defendant had been “convicted,” which allowed the state to impeach the negative answer with evidence that the defendant had previously been charged with failure to yield to a police car. As the defendant was able to explain at trial that the defendant did not think the question pertained to a traffic violation, and the trial court found that there was no reasonable likelihood that such testimony affected the outcome of the trial, the trial court did not err in not granting the defendant a new trial. *Taylor v. State*, 293 Ga. App. 551, 667 S.E.2d 405 (2008).

**Failure to object to use of single interpreter.** — There was no ineffective-

ness of the defendant's trial counsel for failing to seek separate interpreters for the defendant and a codefendant during their criminal trial as there was no showing that the defendant's rights were impinged by the use of a single interpreter. *Hung v. State*, 284 Ga. 796, 671 S.E.2d 811 (2009).

**Failure to invoke rule of sequestration.** — Failure of trial counsel to invoke the rule of witness sequestration did not in itself constitute deficient performance, and as the defendant did not show that any prosecution witness was influenced by the testimony of any other witness, the defendant did not show any prejudice as a result of counsel's failure to invoke the rule. *Bihlear v. State*, 295 Ga. App. 486, 672 S.E.2d 459 (2009).

Trial counsel was not ineffective for failing to request a jury charge on the violation of the rule of sequestration because there was no violation of the rule; even assuming that trial counsel's failure to request such a charge constituted deficient performance, the defendant could not demonstrate prejudice in light of the overwhelming evidence substantiating the defendant's guilt. *Dockery v. State*, 287 Ga. 275, 695 S.E.2d 599 (2010).

Defendant failed to show that the defendant suffered any prejudice as a result of the defendant's trial counsel's failure to object to the presence of a police officer, who was the chief investigator in the case, in the courtroom because the trial court was within the court's discretion to permit the officer to remain in the courtroom and in not requiring that the officer be the first witness called to the stand, and the defendant did not show that the officer's testimony was influenced by the testimony of any other witness; merely failing to object to an investigator's presence, or to the order of the state's witnesses, does not constitute deficient performance. *Andrews v. State*, 307 Ga. App. 557, 705 S.E.2d 319 (2011).

Defendant failed to establish that trial counsel rendered ineffective assistance by failing to move for a mistrial regarding a violation of the rule of sequestration because there was no evidence as to which witnesses violated the rule and whether the witnesses actually testified or spoke

about the witnesses' testimony; the defendant did not show that the outcome of the trial would have been different if counsel called an expert to assist the jury in understanding eyewitness identifications. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

Defendant did not show prejudice due to trial counsel's failure to invoke the rule of sequestration because the jury was informed of the earlier presence of the victim's father in the courtroom, defense counsel thoroughly cross-examined the father, and the trial court properly instructed the jurors on their role in resolving conflicts in the evidence and in determining the credibility of witnesses, the weight of the evidence, and whether a witness was impeached; thus, the jury was able to gauge the father's credibility and make a determination as to the weight, if any, the father would give to the father's testimony. *Pennington v. State*, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Any deficiency by trial counsel in failing to request the trial court to invoke the rule of sequestration was not the cause of any alleged prejudice to the defense because the state had not identified the victim's father as a witness until the parties had presented their opening statements, and, thus, the father would not have been required to stay out of the courtroom even if defense counsel had invoked the rule of sequestration at the beginning of trial. *Pennington v. State*, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Trial counsel was not ineffective for failing to invoke the rule of sequestration at the beginning of the trial because the defendant failed to show any harm that resulted from the admission of the testimony of the victim's father; the evidence presented by both the state and the defense showed that the father's testimony about what happened did not conflict with the defendant's claim. *Pennington v. State*, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

**Failing to request transcription of misdemeanor trial.** — Defendant failed to show counsel was ineffective for not asking that a misdemeanor trial be transcribed. There was testimony that counsel did not request a transcript because the

defendant never asked that one be made and counsel did not believe the defendant could pay for the transcript, and that counsel believed the defendant's right to appeal would be preserved by the statutory substitute for a transcript. *Bagley v. State*, 298 Ga. App. 513, 680 S.E.2d 565 (2009).

**Failure to challenge statute.** — Because the defendant's constitutional challenges to O.C.G.A. § 16-13-31(b) were not supported by the evidence, defendant's trial counsel's performance was not deficient for failing to challenge the constitutionality of the heroin trafficking statute, and since the defendant's claims regarding the constitutionality of the heroin trafficking statute would have failed, the defendant was not prejudiced by defendant's trial counsel's decision not to raise the claims; no evidence was presented that the substance contained in the corner tie that the defendant sold to an undercover officer as heroin contained "infinitesimal and unusable amounts of heroin," heroin was a Schedule I controlled substance, O.C.G.A. § 16-13-25(2)(J), and the General Assembly's different treatment of heroin from other drugs was rationally related to the promotion of a legitimate state objective. *Thomas v. State*, 306 Ga. App. 279, 701 S.E.2d 895 (2010).

**Failure to put defendant on stand.** — Trial counsel was not ineffective for failing to put the defendant on the stand as the defendant confirmed that it was the defendant's decision not to testify. *Goodwin v. State*, No. A12A1762, 2013 Ga. App. LEXIS 164 (Mar. 11, 2013).

**Failure to object to failure to define word.** — Trial counsel was not ineffective for failing to object to the trial court's failure to define the word "theft" as part of the burglary and armed robbery charges as the work was not a technical work of art, but rather a work of general broad connotation and, thus, it was unlikely that the jury was not able to understand the use of the word theft. *Holder v. State*, 319 Ga. App. 239, 736 S.E.2d 449 (2012).

## 6. Critical Stages

**Right to counsel during interrogation.**

Based on the totality of the circum-

stances and the undisputed evidence, because the defendant's confession to a police detective was voluntary and admissible under former O.C.G.A. § 24-3-50 (see now O.C.G.A. § 24-8-820), not coerced or received as a result of promises made, and not subject to exclusion due to improper methods used by the police, the trial court did not err in admitting the confession; further, exclusion of the confession was not required based on a violation of the defendant's right to counsel. *Swain v. State*, 285 Ga. App. 550, 647 S.E.2d 88 (2007).

**Absence of defense counsel at motion in limine.** — Defendant's constitutional right to be present at trial was not violated when defense counsel was not at a pretrial hearing on the state's motion in limine because there was no substantial relationship between the defendant's presence and the defendant's opportunity to defend. *Campbell v. State*, No. S12A1804, 2013 Ga. LEXIS 257 (Mar. 18, 2013).

## 7. Waiver

### Voluntary waiver found.

Defendant signed a Miranda waiver, but later invoked the right to counsel. As there was no evidence the defendant made any additional statements to the officer thereafter, or that the officer interrogated the defendant after the latter invoked the right to counsel, statements the defendant made before invoking that right were properly admitted. *Grant-Farley v. State*, 292 Ga. App. 293, 664 S.E.2d 302 (2008).

As the trial court cautioned the defendant at great length about the dangers of self-representation, but the defendant nevertheless insisted on proceeding pro se, the record established that the defendant knowingly and intelligently waived the right to be represented by counsel. *Hill v. State*, 298 Ga. App. 677, 680 S.E.2d 702 (2009).

Trial court properly allowed the defendant to waive the defendant's right to counsel and represent oneself at trial because the court cautioned the defendant at great length about the dangers of self-representation, and the defendant nevertheless insisted upon self representation; the trial court, through the court's

two colloquies on two separate days prior to the commencement of trial, established that the defendant made a knowing, voluntary, and intelligent waiver of defendant's right to counsel. *Davis v. State*, 304 Ga. App. 355, 696 S.E.2d 381 (2010).

Trial court did not err in finding that the defendant knowingly, voluntarily, and intelligently waived the defendant's right to have a lawyer represent the defendant at trial because the record authorized the trial court to conclude that the defendant's expression of dissatisfaction with the defendant's third lawyer on the day of trial was a dilatory tactic that was the functional equivalent of a knowing and voluntary waiver of appointed counsel, and after the defendant indicated the defendant's desire to proceed pro se, the extensive colloquy between the defendant and the trial court established that the defendant made a knowing and intelligent waiver of the defendant's right to counsel; the defendant did not explain how the knowledge that the defendant could face lesser punishment than the defendant believed would have made the defendant less inclined to waive counsel and the record demonstrated that the defendant was aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver. *Walker v. State*, 288 Ga. 174, 702 S.E.2d 415 (2010).

**Waiver of rights found.** — To the extent defendant's complaint to the trial court reflected defendant's intent to invoke defendant's right to testify, the defendant asserted this right too late, regardless of the defendant's dissatisfaction with defense counsel's performance. To permit the defendant to reopen the evidence after closing arguments and after the State of Georgia had released all of the state's witnesses would have detrimentally affected the fairness and legitimacy of the trial. *Smith v. State*, 306 Ga. App. 693, 703 S.E.2d 329 (2010).

### Effective waiver of counsel.

Because the record showed that the defendant reinitiated further communication with police and made a knowing and intelligent waiver of any right to counsel previously invoked, the record did not support the defendant's claim that the

investigators' accommodation of the defendant's request to speak to the defendant's wife in some way undermined the *Edward v. Arizona*, 451 U.S. 477 (1981) rule by prompting the defendant's request to reinitiate contact with the police. *Rivera v. State*, 282 Ga. 355, 647 S.E.2d 70 (2007).

**No waiver established.**

Because the record showed that the defendant never unequivocally asserted a right to self-representation, the trial court did not err in refusing to allow the defendant to dismiss trial counsel; thus, the trial court properly denied the defendant a new trial. *Pulliam v. State*, 287 Ga. App. 717, 653 S.E.2d 65 (2007), cert. denied, 2008 Ga. LEXIS 159 (Ga. 2008).

When the defendant, who previously waived the right to counsel, appeared for trial and requested court-appointed counsel, the trial court erred in denying the request without any discussion with the defendant to ensure that the defendant fully appreciated both the nature and the consequences of the right that the defendant relinquished and the repercussions of such a waiver. These findings were necessary to effect a valid waiver. *Watkins v. State*, 291 Ga. App. 343, 662 S.E.2d 544 (2008).

State did not show that the defendant made a knowing and intelligent waiver of the right to counsel. There was no evidence that the defendant was adequately informed of the nature of the charges, the possible punishments the defendant faced, the dangers of proceeding pro se, and other circumstances that might affect the defendant's ability to adequately represent the defendant's own self; furthermore, the absence of a trial transcript prevented any consideration of whether the failure to obtain a knowing and voluntary waiver was harmless. *Cook v. State*, 297 Ga. App. 701, 678 S.E.2d 160 (2009).

**Initiation of conversation by defendant.**

Trial court did not err in failing to suppress a statement the defendant made to the police because the statement was made during the course of a subsequent interview that the defendant initiated and was admissible; the defendant contacted the case detective and requested a meet-

ing, the detective met with the defendant and again advised the defendant of the defendant's right to counsel, and the defendant waived the defendant's right to counsel and made an incriminating statement. *Haynes v. State*, 287 Ga. 202, 695 S.E.2d 219 (2010).

Trial court did not err by admitting the defendant's custodial statement to a police detective because after the defendant invoked the right to counsel, the detective ceased the interrogation and was returning the defendant to jail when the defendant told the detective that the defendant would tell the detective what the detective wanted to know and then gave an incriminating statement upon returning to the room where the interrogation was conducted. *Anthony v. State*, 315 Ga. App. 701, 727 S.E.2d 528 (2012).

**Ineffective assistance of counsel claim was waived, etc.**

Habeas court erred in granting the defendant a new trial on the ground that the defendant received ineffective assistance of counsel on appeal since the defendant was not afforded defendant's constitutional right to conflict-free appellate representation because the habeas court improperly relied on the theory that the defendant would lose defendant's right to raise the issue of ineffective assistance of trial counsel if it were not raised prior to defendant's direct appeal; when the defendant is represented by trial counsel through completion of the appellate process, the failure to raise the issue of ineffective assistance of trial counsel prior to the direct appeal does not constitute a waiver of the ability to raise the claim since the defendant is able to raise the claim in a habeas proceeding. *Williams v. Moody*, 287 Ga. 665, 697 S.E.2d 199 (2010).

Defendant's claim that trial counsel was ineffective when counsel failed to request that the jury panel be qualified again after the interview of new witnesses was waived because the issue was not raised either in the motion for new trial as amended or at the hearing thereon by appellate counsel, who had been appointed following the defendant's conviction. *Norris v. State*, 289 Ga. 154, 709 S.E.2d 792 (2011).

**Impact of illness of counsel.** — Defendant did not receive ineffective assistance of trial counsel when counsel allowed the defendant's first scheduled trial to be canceled in the defendant's absence because the defendant did not show that the outcome of the defendant's trial would have been different if the defendant had been present that morning to hear that counsel was too ill to proceed. *Neal v. State*, 308 Ga. App. 551, 707 S.E.2d 503 (2011).

**Request for counsel mid-trial after requesting self representation.** — Although the trial court erred by initially stating, during the course of the lengthy colloquy over self-representation, that once the defendant chose to represent oneself, the defendant could not change the defendant's mind mid-trial, the misstatement did not require the reversal of the defendant's conviction because no harm resulted; during the trial, the defendant did in fact change the defendant's mind and requested counsel, and the trial court granted the request. *Davis v. State*, 304 Ga. App. 355, 696 S.E.2d 381 (2010).

**Self-representation did not violate right to counsel.** — Trial court did not err in imposing a sentence of life imprisonment without parole because the record did not support the defendant's assertion that the conviction was obtained in violation of the defendant's constitutional right to counsel; the state offered evidence that the defendant's prior case was tried before a jury, that the defendant exercised the constitutional right to self-representation, and that appointed standby counsel was available to assist the defendant at trial. *Willis v. State*, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

## 8. Appeals

### Out-of-time appeal.

The trial court abused its discretion in denying the defendant an out-of-time appeal without a hearing, which alleged that both the defendant's trial and appellate counsel were ineffective, as: (1) no case law or rules of court required that a motion for out-of-time appeal be verified or accompanied by an affidavit, as the trial judge seemingly required, in order to be

granted a hearing on the matter; and (2) given the lack of contrary evidence in the record, the trial judge failed to make a judicial inquiry into whether the defendant was responsible for the failure to pursue a timely direct appeal. *Ray v. State*, 287 Ga. App. 492, 652 S.E.2d 165 (2007).

**Defendant not entitled to appointment of counsel to prosecute motion to vacate void and illegal sentence.** — Trial court did not err in failing to appoint counsel to prosecute the defendant's motion to vacate a void and illegal sentence because the defendant did not file a motion to withdraw the guilty plea which, if timely, would have triggered the right to appointed counsel; an indigent defendant who has filed a motion to vacate void sentences is not entitled to counsel to pursue either the motion or an appeal from the denial thereof. *Pierce v. State*, 289 Ga. 893, 717 S.E.2d 202 (2011).

**Defendant not entitled to appointment of counsel to prosecute motion for out-of-time appeal.** — Trial court did not err in failing to appoint counsel to prosecute the defendant's motion for out-of-time appeal because the defendant did not file a motion to withdraw the guilty plea which, if timely, would have triggered the right to appointed counsel; because a motion for an out-of-time appeal cannot be construed as part of a criminal defendant's first appeal of right, a defendant is not entitled to the assistance of appointed counsel. *Pierce v. State*, 289 Ga. 893, 717 S.E.2d 202 (2011).

**Ineffectiveness argument cannot be expanded on appeal.** — Defendant was attempting to expand the original allegation of ineffectiveness on appeal when the defendant argued that trial counsel was ineffective in failing to object to the testimony of a police detective regarding the victim's truthfulness because in the defendant's motion for new trial, the defendant asserted only that counsel was ineffective in failing to object to the prosecutor's questioning of the detective concerning whether the victim was truthful when the victim gave an initial statement to and identified the defendant; the defendant could not expand the assertion in the trial court to include other state-

ments by the victim or any questions directed to detectives concerning those later statements. *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

### Compulsory Process

**Right not violated when subpoenas issued.** — Defendant's claim that the right to compulsory process was circumvented when the trial court granted the state's motion to quash subpoenas issued to a judge, a probation officer, and a drug-court coordinator failed, because the subpoenas were issued and served on the witnesses who, in fact, appeared and whose testimony was proffered outside the presence of the jury. *Poole v. State*, 291 Ga. 848, 734 S.E.2d 1 (2012).

**Out-of-state corporation.** — Court of Appeals erred when the court concluded that a request under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90), that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. *Yearly v. State*, 289 Ga. 394, 711 S.E.2d 694 (2011).

### Right to Confrontation

#### 1. In General

**No right to cross examine defendant's translator.** — With regard to various drug-related convictions, defendant's Sixth Amendment right to confrontation was not violated by the trial court refusing to allow defendant to cross-examine defendant's Spanish translator after defendant's tape-recorded statement was played before the jury and defendant as-

serted that certain statements were translated incorrectly as, under the language conduit rule, the translator's statements were defendant's own and, therefore, defendant had no right to, in essence, confront defendant. *Hernandez v. State*, 291 Ga. App. 562, 662 S.E.2d 325 (2008), cert. denied, No. S08C1631, 2008 Ga. LEXIS 763 (Ga. 2008).

**Failure of defendant to advise of problems with interpreters.** — Trial court did not err in finding that the defendant failed to meet the defendant's burden of showing that the performance of the defendant's attorneys was deficient because the defendant's counsel recognized the need for interpreters and secured the interpreters; the defendant, who spoke only Spanish, had ample opportunity to inform counsel or the trial court of any problems with the interpreters, and the fact that the defendant did not do so hampered the defendant in meeting the defendant's burden to show that counsel's performance in securing interpreters to assist the defendant was inadequate. *Pineda v. State*, 288 Ga. 612, 706 S.E.2d 407 (2011).

#### Failure to interview witness.

Defendant was convicted of violating a protective order by driving within 100 yards of the defendant's ex-spouse and child, honking his horn and yelling at the ex-spouse. As the jury likely credited the ex-spouse's testimony that the defendant drove within five yards of the ex-spouse and child, any failure by trial counsel to have adequately interviewed a witness who testified that the house the defendant was visiting was 9,375 feet away from the ex-spouse's home did not prejudice the defendant. *Bee v. State*, 294 Ga. App. 199, 670 S.E.2d 114 (2008).

Defendant failed to establish that the defendant suffered prejudice due to defense counsel's failure to interview the defendant's co-indictees prior to trial because the defendant made no attempt to detail what information could have been revealed pre-trial if counsel interviewed the co-indictees and how such information would have been helpful to the defendant's defense; defense counsel thoroughly cross-examined both co-indictees and impeached one of the co-indictees

with the co-indictee's various prior inconsistent statements to police investigators. *Moore v. State*, 288 Ga. 187, 702 S.E.2d 176 (2010).

**Failure to interview detective who would be witness in trial.** — Trial counsel's failure to personally interview a detective before trial did not fall below an objective standard of reasonableness as counsel saw no need to interview the detective because counsel had obtained and reviewed the detective's detailed written report, and counsel considered the witness to be only of secondary importance. *Lewis v. State*, 297 Ga. App. 517, 677 S.E.2d 723 (2009).

**Non-testifying victim's statements were pertinent to medical treatment.** — With regard to a defendant's trial and conviction for aggravated sodomy and simple battery involving the sexual assault of an inmate upon an inmate, the trial court did not violate the defendant's rights under the Confrontation Clause by admitting the statements made by the victim to the physician and the nurse who treated the victim for the injuries received because the statements were admissible under former O.C.G.A. § 24-3-4 (see now O.C.G.A. § 24-8-803), the medical diagnosis or treatment exception, and did not fall within any class of testimonial statement. In particular, no objective witness would reasonably conclude that the statements were made under such circumstances that the statement would be available for use at a later trial. *Mitchell v. State*, 289 Ga. App. 55, 656 S.E.2d 145 (2007), cert. dismissed, No. S08C0770, 2008 Ga. LEXIS 499 (Ga. 2008).

**Confrontation rights were violated, but admission of hearsay evidence was harmless,** given the overwhelming evidence of the defendant's guilt, the fact that the victim's taped account of the argument between the defendant and the defendant's wife was cumulative to, and corroborative of, the defendant's own testimony, and as the erroneously admitted hearsay evidence did not contribute to the verdict. *Delgado v. State*, 287 Ga. App. 273, 651 S.E.2d 201 (2007).

**Confrontation rights not violated despite admission of hearsay.**

With regard to defendant's trial and

conviction for child molestation, the trial court did not err by allowing the admission of the victim's hearsay statements as defense counsel had subpoenaed the victim and announced that defense counsel intended to call the victim as a trial witness; although the victim ultimately was not called to testify, the record established that the victim was present and available for cross-examination, and therefore, there was no *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), violation presented in the case. *Williams v. State*, 290 Ga. App. 841, 660 S.E.2d 740 (2008).

The admission of an informant's testimony regarding knowledge of the defendant's participation in the victim's murder did not amount to inadmissible hearsay and did not violate the Confrontation Clause, as the hearsay was cumulative of admissible evidence adduced at trial and, in light of the overwhelming evidence of the defendant's guilt, there was no reasonable possibility that the confrontation violation contributed to the guilty verdict. *Warren v. State*, 283 Ga. 42, 656 S.E.2d 803 (2008).

Trial court properly denied defendant's motion for a new trial and upheld his conviction for child molestation because even if the trial court erred by admitting the child victim's recorded interview and her statements to the police investigator, the forensic interviewer, her mother, and a relative, any such error was harmless beyond a reasonable doubt because the evidence against defendant was so overwhelming and cumulative in the nature of the testimony of the emergency room physician, defendant's written statement and recorded confession, and his admissions to others; plus, the child victim's recantations were also admitted into evidence. *Welch v. State*, 318 Ga. App. 202, 733 S.E.2d 482 (2012).

**Confrontation rights were violated.**

Because the victim was unavailable at trial, having died since the alleged burglary, and had not been subject to cross-examination by the defendant, upon the state's concession that admission of the victim's identification of the defendant at the scene was harmful, the defendant's burglary conviction was reversed. *Davis v.*

State, 289 Ga. App. 526, 657 S.E.2d 609 (2008).

**Limit to cross-examination.**

In a prosecution for aggravated sodomy, aggravated child molestation, and child molestation, the trial court abused its discretion in excluding evidence about the child victim's demeanor during the time of the reported abuse, and in sustaining the state's vague objection to defense counsel's cross-examination without any explanation, as the sought-after evidence could have been relevant to support the defense that the victim was influenced by the child's other grandmother into making accusations against the defendant and could have provided the only available evidence as to whether or how the other grandmother might have influenced the child's relations with the defendant. *Slade v. State*, No. A07A0734, 2007 Ga. App. LEXIS 792 (July 9, 2007).

With regard to a defendant's trial and ultimate conviction on charges of malice murder, armed robbery, and possession of a firearm during the commission of a felony, the trial court did not abuse its discretion in limiting the scope of the defendant's cross-examination of the testifying victims regarding the immigration status of the victims; the immigration status of the victims was not an issue relevant to the matter being tried, namely whether the defendant committed the crimes charged. *Junior v. State*, 282 Ga. 689, 653 S.E.2d 481 (2007).

The trial court properly refused to allow a defendant who claimed that the defendant had unknowingly transported drugs to cross-examine the state's expert about the mandatory minimum sentence for cocaine trafficking in order to show that a dealer would have the incentive to have an innocent person transport drugs. Allowing such evidence was improper where there was a hypothetical wrongdoer who was not identified, not charged with a crime, not testifying, and not subject to cross-examination, and who had not made a deal with the state. *Perkins v. State*, 288 Ga. App. 802, 655 S.E.2d 677 (2007).

Defendant had not been denied right to thorough and sifting cross-examination when trial court sustained state's objection to a question of a car salesperson

where the salesperson had already testified twice that defendant had not driven a car on a certain day when defendant asked the salesperson whether defendant had never driven the car; defense counsel had not offered to rephrase the question or explain to trial court what counsel was trying to ascertain, and defendant had not shown that the limitation of the line of questioning was harmful. *Head v. State*, 290 Ga. App. 823, 660 S.E.2d 871 (2008).

The trial court did not abuse its discretion by refusing to allow any cross-examination of an investigator as to that part of the defendant's custodial statement in which the defendant identified a codefendant as the individual to whom the defendant rented a panel van used as a methamphetamine lab. Inasmuch as the defendant did not testify, the admission of the defendant's custodial statement implicating the codefendant was barred by *Bruton*. *Boone v. State*, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Because defendant waived an objection to the trial court's ruling on the scope of defendant's cross-examination of a witness by failing to object, and because a juror stated that the juror could be fair and impartial when hearing the case, the trial court did not abuse the court's discretion in denying defendant's motion for a new trial. *Pinckney v. State*, 285 Ga. 458, 678 S.E.2d 480 (2009).

**Telephone records as business records and counsel's objection without merit.** — Although the defendant claimed that the defendant's trial counsel was ineffective in permitting the admission of certain phone records, trial counsel did object to admission of the records, but the trial court overruled the objection; the evidence showed that the records were maintained in computer storage as business records, the trial court therefore did not err in admitting the records under the business records exception to the hearsay rule, and the defendant thus failed to demonstrate deficient performance. In any event, the evidence of the defendant's guilt was overwhelming, there was no reasonable probability the outcome would have been more favorable had counsel done the things the defendant claimed that counsel should have, and no preju-

dice was shown. *Washington v. State*, 285 Ga. 541, 678 S.E.2d 900 (2009).

**Admission of “testimonial” statements was harmless error.**

Because the state’s evidence in support of its charges was overwhelming, even if the trial court erred in permitting a witness to testify regarding statements made to the witness by the victim, the error was harmless. Thus, no violation of the defendant’s confrontation rights occurred. *Debro v. State*, 282 Ga. 880, 655 S.E.2d 804 (2008).

**Statements not testimonial.**

Admission of statements that the victim made to a police investigator regarding the victim’s fear of the defendant on the day that the victim was murdered did not violate the defendant’s right to confrontation, because the statements were not testimonial where the victim was not reporting a crime to the policeman or building a case against the defendant, the victim was merely seeking advice from a knowledgeable friend, who happened to be a policeman. *Breedlove v. State*, 291 Ga. 249, 728 S.E.2d 643 (2012).

**Admission of co-indictee’s refusal to testify was harmless error.** — With regard to defendant’s trial for felony murder and other crimes, trial court did not commit reversible error by holding co-indictee in contempt for refusing to testify after invoking the Fifth Amendment and then recalling the jurors and informing them that co-indictee had pled guilty to various offenses, refused to cooperate with state despite an offer of immunity, and that co-indictee had been held in contempt for that refusal. *Hendricks v. State*, 283 Ga. 470, 660 S.E.2d 365 (2008).

**Bruton violation not shown.**

Defendant’s custodial statements that the defendant was not present and that the defendant had an alibi did not inculcate the codefendants. It followed that the trial court did not abuse the court’s discretion in denying motions for mistrial on Bruton grounds. *Metz v. State*, 284 Ga. 614, 669 S.E.2d 121 (2008), overruled on other grounds, *State v. Kelly*, 290 Ga. 29, 718 S.E.2d 232 (2011).

**No Crawford violation.**

In defendant’s convictions on one count of simple assault and two counts of bat-

tery, trial court properly determined that audiotape of 9-1-1 call made by the victim was nontestimonial in nature as the caller advised that the caller had been hit, had a swollen face, was experiencing serious bleeding and the call was made with such immediacy after the attack that, upon the officer’s arrival, the caller was scared and crying, and blood was running down the caller’s chin, shirt, and pants; thus, trial court properly found that the call was nontestimonial in nature in that it was made to seek assistance in a situation involving immediate danger. *Thompson v. State*, 291 Ga. App. 355, 662 S.E.2d 135 (2008).

**Admission of hearsay under res gestae exception did not violate defendant’s right of confrontation.** — In a speeding and eluding prosecution, under the res gestae exception to the former hearsay rule, former O.C.G.A. § 24-3-3 (see now O.C.G.A. § 24-8-803), an officer was properly allowed to testify that a bystander had asked the officer whether the officer was searching for a blue sports car and then pointed to a direction. Since no testimonial statement was involved, the defendant’s rights to confrontation as interpreted by *Crawford v. Washington*, 541 U.S. 36 (2004), were not violated. *Segel v. State*, 293 Ga. App. 506, 667 S.E.2d 670 (2008).

## 2. Right to be Present

**Rights waived when accused absents oneself from trial.**

Trial court did not abuse the court’s discretion by denying a defendant’s motion for a new trial based on the defendant vomiting in front of the jury during voir dire when the trial was commenced after a two day delay that was granted to the defendant after indicating an illness prevented the defendant’s presence at trial. The trial court properly found that the alleged ill defendant waived the right to be present by repeatedly delaying the start of trial with the malingering conduct and by failing to object when defense counsel, in the defendant’s presence, specifically requested that the trial court remove the defendant from the courtroom before bringing the jury panel back. Smith

v. State, 284 Ga. 599, 669 S.E.2d 98 (2008).

Because the trial court's determination of the restitution amount was authorized by O.C.G.A. § 17-14-7(b) and did not unlawfully enhance a defendant's sentence, the defendant did not have a substantive

right to have the restitution hearing held within a certain time; defendant waived the rights to be present and to confrontation by voluntarily choosing not to attend the hearing. *Williams v. State*, 311 Ga. App. 152, 715 S.E.2d 440 (2011), cert. denied, 2012 Ga. LEXIS 69 (Ga. 2012).

## RESEARCH REFERENCES

**ALR.** — Adequacy of defense counsel's representation of criminal client regarding entrapment defense — state cases, 43 ALR6th 475.

What constitutes "custodial interrogation" within rule of requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — At border or functional equivalent of border, 68 ALR6th 607.

Criminal defendant's right to electronic recordation of interrogations and confessions, 69 ALR6th 579.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Pretrial motions — Suppression motions where no warrant involved, 71 ALR6th 1.

Propriety and prejudicial effect of requiring defendant to wear stun belt or shock belt during course of state criminal trial, 71 ALR6th 625.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Pretrial motions — Suppression motions where warrant was involved, 72 ALR6th 1.

Reverse-Franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — Underlying homicide and assault offenses, 72 ALR6th 437.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Pretrial motions — Motions other than for suppression, 73 ALR6th 1.

Reverse-Franks claims, where police ar-

guably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for truth — Underlying drug offenses, 73 ALR6th 49.

Reverse-Franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — Underlying sexual offenses, 74 ALR6th 69.

Construction and application by state courts of Supreme Court's ruling in *Padilla v. Kentucky*, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), that defense counsel has obligation to advise defendant that entering guilty plea could result in deportation, 74 ALR6th 373.

Construction and application of constitutional rule of *Miranda* — Supreme Court Cases, 17 ALR Fed. 2d 465.

Claims of ineffective assistance of counsel in death penalty proceedings — United States Supreme Court cases, 31 ALR Fed. 2d 1.

Construction and application of Sixth Amendment right to counsel — Supreme Court cases, 33 ALR Fed. 2d 1.

Adequacy of defense counsel's representation of criminal client regarding entrapment defense — Federal cases, 42 ALR Fed. 2d 145.

Ineffective assistance of counsel in removal proceedings — Legal basis of entitlement to representation and requisites to establish prima facie case of ineffectiveness, 58 ALR Fed. 2d 363.

Ineffective assistance of counsel in removal proceedings — Particular omissions or failures, 60 ALR Fed. 2d 59.

## Paragraph XV. Habeas corpus.

## JUDICIAL DECISIONS

**Motion to file out-of-time appeal.**

Given that the defendant had no right to file a direct appeal from a guilty plea that was evident from the record, a motion for an out-of-time appeal, which alleged ineffective assistance of counsel, was properly denied, and counsel could not be deemed ineffective for failing to inform the defendant of the right to appeal; thus, the defendant's only remedy was by habeas corpus. *Barlow v. State*, 282 Ga. 232, 647 S.E.2d 46 (2007).

**Prerequisite for relief from allegedly void sentence.** — The trial court properly dismissed the defendant's motion to correct an allegedly void felony sentence, as the sentence was authorized by the law in existence at the time of the defendant's statutory rape convictions, and the defendant failed to seek withdrawal of the guilty pleas which led to the same as a prerequisite to challenge the sentence imposed; thus, any further relief had to be sought through a petition for habeas corpus. *McClendon v. State*, 287 Ga. App. 515, 651 S.E.2d 820 (2007), cert. denied, 2008 Ga. LEXIS 174 (Ga. 2008).

**Ineffective assistance of counsel claim.**

In a warden's appeal, the grant of habeas corpus relief to an inmate based on ineffective assistance of counsel was upheld as the kidnapping charges in the two counties charged against the inmate were for the same offense and being advised by defense counsel to plead guilty in one county to avoid prosecution in the other was erroneous since double jeopardy would have barred any additional prosecution. *Upton v. Johnson*, 282 Ga. 600, 652 S.E.2d 516 (2007).

Habeas court did not err in granting the appellee's petition for writ of habeas corpus because there was no error in the habeas court's finding of an actual conflict of interest that adversely affected plea counsel's performance since the fact that the codefendant alone was paying counsel's fees created a strong incentive for counsel to prioritize the codefendant's interests in the matter over the appellee's

interest, and counsel not only failed to pursue an alternative defense theory on behalf of the appellee, counsel failed even to recognize the possibility that one could exist; even though the appellee and the codefendant pursued a unified defense in that their accounts of the incident were consistent, the record reflected that the appellee was the less culpable of the two in the crime, as it appeared that the appellee's participation was limited to the role of a passive witness who happened to be driving when the codefendant initiated the brief, apparently unpremeditated interaction with the victim. *State v. Mamedov*, 288 Ga. 858, 708 S.E.2d 279 (2011).

Habeas court correctly concluded that ineffective assistance of trial counsel could not be used to excuse the procedural default of the petitioner's claim that the petitioner was mentally incompetent during trial because the information that trial counsel then had available to them, including the information that trial counsel unreasonably failed to obtain, would not have led constitutionally effective counsel to pursue a claim of incompetence to stand trial and would not be reasonably probable to have resulted in a finding that the petitioner was incompetent had such a plea been pursued; the petitioner failed to prove that trial counsel rendered ineffective assistance regarding the petitioner's competence to stand trial because trial counsel withdrew the petitioner's plea of incompetence only after satisfying themselves that counsel was able to communicate effectively with the petitioner, and the trial court had an extensive opportunity to observe the petitioner in pre-trial and trial proceedings and to interact directly with the petitioner, and the court did not see sufficient indications of incompetence to pursue further evaluation. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

Habeas court's order denying the petitioner's claim that the petitioner was entitled to a new sentencing trial was reversed and the petitioner's death sentence

was vacated because trial counsel performed deficiently by failing to sufficiently develop mitigating evidence from non-experts, and there was a reasonable probability that the jury would have reached a different outcome in the sentencing phase of the petitioner’s trial if the additional evidence habeas counsel obtained had been presented at trial; trial counsel failed to fully investigate whether the petitioner had suffered one or more brain injuries prior to the petitioner’s crimes, and unduly limiting their interviews of the petitioner’s family and friends to an unreasonably narrow range of persons, and there was additional evidence from non-experts concerning the petitioner’s traumatic childhood and the petitioner’s change in behavior and apparent mental distress following two head injuries. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

**Procedural bars not found.**

Defendant’s petition for habeas corpus was improperly denied on the basis of procedural default as the trial court improperly failed to appoint counsel to represent the defendant on appeal after a motion for new trial was denied as the trial court was aware of the defendant’s desire to appeal and the defendant’s indigency; the defendant was prejudiced as the defendant’s notice of appeal filed pro se was untimely. *Davis v. Frazier*, 285 Ga. 16, 673 S.E.2d 215 (2009).

**Habeas relief properly granted.** — Because the record failed to contain some affirmative evidence that either the trial court or trial counsel entered into a colloquy with an inmate and explained the inmate’s Boykin rights, but merely provided the state’s speculation that trial counsel might have possibly discussed the inmate’s Boykin rights based on counsel’s act of signing the plea agreement, that record failed to show that the inmate’s plea was knowingly, voluntarily, and intelligently made and supported the grant of habeas relief. *State v. Hemdani*, 282 Ga. 511, 651 S.E.2d 734 (2007).

**Denial of relief held proper.**

While the first of two notice of appeals from an order denying a detainee habeas relief did not invoke the appellate court’s jurisdiction, as the denial of a motion for

reconsideration of a final judgment was not subject to direct appeal, a second timely notice did not afford the detainee any relief as the failure to hold a preliminary commitment hearing following indictment was not erroneous. *Ferguson v. Freeman*, 282 Ga. 180, 646 S.E.2d 65 (2007).

A pre-trial petition for a writ of habeas corpus filed by a jail inmate was properly denied as both the trial court and the habeas court correctly held that the inmate was entitled to have bail set on only the charge set forth in the arrest warrant, and not the other six charges handed down in the grand jury’s subsequently issued indictment. *Bryant v. Vowell*, 282 Ga. 437, 651 S.E.2d 77 (2007).

Georgia habeas court did not err by not examining a probable cause determination by a Washington magistrate because extradition documents were facially valid, a defendant had four felony charges pending in Washington, the defendant was the same person named in the extradition documents, and the defendant was a fugitive from Washington authorities; there was sufficient prima facie evidence to show that the defendant was a fugitive from justice. *Smith v. State*, 284 Ga. 356, 667 S.E.2d 95 (2008).

An appellant was not entitled to a writ of habeas corpus after serving four 12-month sentences of probation for four counts of public indecency under O.C.G.A. § 16-6-8 related to an incident in which the appellant began to masturbate while alongside a school bus as the appellant failed to show adverse collateral consequences as the appellant only made a bald claim that being sentenced on four counts of public indecency, as opposed to one, created more difficulty in finding employment; based on the plea agreement, the merger of the charges was expressly rejected by the appellant in order to effectuate the negotiated pleas to a misdemeanor. *Turner v. State*, 284 Ga. 494, 668 S.E.2d 692 (2008).

Habeas court did not err by relying on the waiver of rights form the petitioner signed because there was clear evidence beyond the mere execution of a waiver form that proved that the petitioner had been apprised of the Boykin rights; the

guilty plea hearing transcript affirmatively reflected that the trial court entered into a colloquy with the petitioner to ensure that the petitioner read and fully understood the waiver of rights agreement, which the petitioner signed, and the signed “certificate of lawyer” at the conclusion of the waiver of rights form, together with the petitioner’s own acknowledgment at the guilty plea hearing, served to prove that trial counsel actually went over the waiver of rights form with the petitioner and the information that the form contained. *Brown v. State*, 290 Ga. 50, 718 S.E.2d 1 (2011).

**Challenge to enhanced sentence based on allegedly defective indictment.** — Defendant could not challenge a sentence for family violence battery on appeal, claiming that the sentence was erroneously enhanced from a misdemeanor to a felony under O.C.G.A. § 16-5-23.1(f)(2) based on a previous conviction arising from a guilty plea to the

same offense that was based on a defective indictment because since the defendant failed to challenge the indictment at the time the defendant pleaded guilty, the proper remedy was a motion in arrest of judgment under O.C.G.A. § 17-9-61(b) or habeas corpus. *Grogan v. State*, 297 Ga. App. 251, 676 S.E.2d 764 (2009).

**Mental incompetence.** — O.C.G.A. § 17-10-60 et seq. is the exclusive procedure for raising a mentally incompetent challenge after sentencing, O.C.G.A. § 17-10-62, and creates a rebuttable presumption against re-litigation of a finding of competency instead of applying the stricter habeas procedural default standard, O.C.G.A. § 17-10-69; accordingly, this issue should not arise in habeas proceedings in Georgia. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

**Cited in** *Sutton v. Sanders*, 283 Ga. 28, 656 S.E.2d 796 (2008); *Taylor v. Williams*, 528 F.3d 847 (11th Cir. 2008).

Paragraph XVI. Self-incrimination.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- RIGHT AGAINST SELF-INCRIMINATION
- CLAIM OF PRIVILEGE
- WAIVER OF PRIVILEGE
- EVIDENCE
  - 2. ADMISSIBLE
  - 3. INADMISSIBLE
  - 4. VOLUNTARINESS

General Consideration

**Factors for determining whether defendant in custody.** — Trial court erred in suppressing a defendant’s pre-Miranda statements based on the court’s findings that police had probable cause to arrest and that defendant was the focus of the investigation as these considerations were irrelevant for determining whether the defendant was “in custody” for Miranda purposes. The proper inquiry was how a reasonable person in the defendant’s position would have perceived the situation. *State v. Folsom*, 285 Ga. 11, 673 S.E.2d 210 (2009).

**Inadequate invocation of self-incrimination privilege.** — Because defendant’s statement that defendant should not talk in the absence of “real talk” was insufficient to trigger the interrogating agent’s duty to cease questioning, the trial court did not err in admitting defendant’s later statements to the police. *Barnes v. State*, 287 Ga. 423, 696 S.E.2d 629 (2010).

**Comments on pre-trial silence.**  
In a case in which ineffective assistance of counsel was claimed due to counsel’s failure to object to a comment in the prosecutor’s closing argument that the defendant could have given the defen-

dant's version of the facts of a domestic dispute to the police, the appellate court improperly relied on exclusions to comments on a defendant's silence in *Morrison v. State*, 554 S.E.2d 190 (2001); the court overruled *Morrison* based on the bright-line rule in *Mallory v. State*, 409 S.E.2d 839 (1991), that, with reference to former O.C.G.A. § 24-3-36 (see now O.C.G.A. § 24-8-801), that comment upon a defendant's silence or failure to come forward was far more prejudicial than probative. *Reynolds v. State*, 285 Ga. 70, 673 S.E.2d 854 (2009).

**Requiring defense counsel to produce copies of videotape not an act of incrimination.** — Trial court's reproduction of missing videotape exhibits for appeal was proper because, *inter alia*, contrary to the defendant's claim, requiring defense counsel to turn over counsel's copy of the tapes was not an act of incrimination against the defendant, but rather was an effort to allow the defendant to complete the record in the defendant's own appeal. *Hughes v. State*, 298 Ga. App. 113, 679 S.E.2d 121 (2009).

### Right Against Self-Incrimination

#### Applicability of privilege.

Defendant in a criminal case, an attorney who was the sole shareholder of a professional corporation, was properly held in civil contempt for not producing a noncompetition agreement between the corporation and a former employee. The agreement was a corporate document, and the defendant had been subpoenaed to produce the document as a corporate agent; thus, the defendant could not assert the defendant's personal right against self-incrimination and the small size of the corporation was immaterial. *Thompson v. State*, 294 Ga. App. 363, 670 S.E.2d 152 (2008).

#### Criminal Procedure Discovery Act.

— The requirement of O.C.G.A. § 17-16-4, part of the Criminal Procedure Discovery Act, that a defendant disclose any mitigating evidence the defendant intended to introduce in the presentence hearing did not violate the defendant's privilege against self-incrimination; statements of witnesses a defendant intends to call to testify are not personal to the

defendant, and although the disclosure of the list of witnesses a defendant intends to call is personal to the defendant, a trial court can exercise its discretion to specify the time, place, and manner of making the discovery and to enter such orders as seem just under the circumstances when self-incrimination concerns arise, such as a protective order or a continuance pending the completion of the guilt/innocence phase of the trial. *Muhammad v. State*, 282 Ga. 247, 647 S.E.2d 560 (2007).

**Statements voluntary.** — Statements the defendant made at the scene and the station during an interview were admissible because the defendant received and waived *Miranda* warnings before making the incriminating statements, and the defendant's interrogators testified that the interrogators made no threats or promises and did not coerce the defendant in any way. *Simmons v. State*, 291 Ga. 664, 732 S.E.2d 65 (2012).

**Testimony that was an improper comment on a defendant's silence, etc.**

An officer's vague, nonresponsive comment, in response to defense counsel's interrogation, that the defendant had invoked the defendant's right to remain silent did not merit reversal as defense counsel had quickly moved past the comment and the state had not drawn attention to the comment or encouraged the jury to infer guilt from the defendant's silence. *Lenon v. State*, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

Conviction for driving under the influence was affirmed because the prosecutor did not manifestly intend to comment on the defendant's failure to testify and the nature of the statement by the prosecutor was not such that the jury would naturally and necessarily have taken the statement to be such a comment. Moreover, even assuming that the statement was an improper comment on the defendant's failure to testify, considering that the comment did not appear intentionally designed to or likely to urge any negative inference, the context in which the comment was made, and the strength of the evidence against the defendant, any error was harmless beyond a reasonable doubt. *Schenck v. State*, 307 Ga. App. 890, 706 S.E.2d 218 (2011).

**No violation by taking of blood and urine samples.** — Admitting the results of blood and urine analysis into evidence in the defendant's felony murder trial did not violate U.S. Const., amend. V, Ga. Const. 1983, Art. I, Sec. I, Para. XVI, or former O.C.G.A. § 24-9-20(a) (see now O.C.G.A. § 24-5-506) because the removal of a substance from the body through a minor intrusion did not cause the defendant to be a witness against oneself within the meaning of the Fifth Amendment and similar provisions of Georgia law. *Bowling v. State*, 289 Ga. 881, 717 S.E.2d 190 (2011).

**Prosecutor's comment about the defense's failure to rebut state's evidence** was not an improper comment on the defendant's failure to testify. *Lenon v. State*, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

**Improper comment on defendant's silence required new trial.** — Because the trial court erroneously commented on the defendant's refusal to make a post-arrest statement to police, and the error, absent a curative instruction, was not harmless or the result of inadvertence, the defendant's robbery by sudden snatching conviction was reversed; thus, the trial court erred in denying the defendant a new trial on those grounds. *Wright v. State*, 287 Ga. App. 593, 651 S.E.2d 852 (2007).

#### **Not in custody.**

As the defendants voluntarily went to the police station, were not under formal arrest at any time during their interviews, and were told before the interview that the defendants were free to leave, a reasonable person in the defendants' situation would not have felt so restrained as to equate to a formal arrest. Therefore, the failure to give the defendants *Miranda* warnings did not require suppression of the defendants' statements. *Carter v. State*, 285 Ga. 394, 677 S.E.2d 71 (2009).

**Defendant driven to hospital by police not in custody and *Miranda* not required.** — Since the defendant was not under formal arrest or any restraint when an officer questioned the defendant in the defendant's hotel room and drove the defendant to a hospital, *Miranda* warnings were not required. That the defendant

was the focus of a murder investigation did not require the officer to give *Miranda* warnings; the relevant inquiry was whether a reasonable person in the defendant's situation would have perceived that the person was in custody. *Timmreck v. State*, 285 Ga. 39, 673 S.E.2d 198 (2009).

#### **Claim of Privilege**

**Evidence of defendant's post-arrest silence admitted in error harmless.** — In a prosecution for battery and aggravated assault, defense counsel's failure to object to a police officer's single gratuitous reference to the defendant's post-arrest silence was not reversible error because, in view of the strong evidence of the defendant's guilt, this error was unlikely to have affected the outcome of the trial. *Crawford v. State*, 294 Ga. App. 711, 670 S.E.2d 185 (2008).

#### **Waiver of Privilege**

**Juvenile waiver-of-rights form.** — The trial court did not err in finding that a defendant made a knowing and intelligent waiver of the defendant's federal and state constitutional rights prior to giving a statement to police because a juvenile waiver-of-rights form was read in its entirety to, and signed by, the defendant and the defendant's parent, and neither the defendant nor the defendant's parent ever invoked the defendant's right to remain silent or asked that the questioning cease. *Norris v. State*, 282 Ga. 430, 651 S.E.2d 40 (2007).

**Waiver held to have been knowing and voluntary.** — A trial court did not err in ruling that a defendant's statements were made following a knowing and voluntary waiver of the right against self-incrimination: the 15-year-old defendant (1) stated that the defendant wanted to speak to an officer the morning after the defendant had refused to talk to police after being given *Miranda* warnings; (2) was given *Miranda* warnings again after indicating a willingness to talk, and did not request the presence of a relative or an attorney; and (3) had received no threats or promises from the attending officer. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

Evidence supported the trial court's

finding that a defendant waived the defendant's right to counsel and that the defendant's statements to a detective were made voluntarily; thus, the statements were properly admitted into evidence. After the defendant said that the defendant wanted a lawyer, the defendant said that the defendant would tell the detective what happened if the defendant could speak to the defendant's family; after speaking with family members, the defendant was again advised of the defendant's rights and waived those rights; and after again asking to speak to police the next day, the defendant was again advised of the defendant's rights and waived those rights. *Holmes v. State*, 284 Ga. 330, 667 S.E.2d 71 (2008).

Trial court did not err in admitting a defendant's custodial statement into evidence, although the defendant argued that the defendant was illiterate and was awoken at 3 A.M. to give a statement, because the interviewing officer read the defendant the defendant's rights; the defendant appeared to understand those rights; the defendant complained of no physical injury or ailment; the police removed the defendant's handcuffs, permitting the defendant to use the restroom, and offered the defendant water; and the defendant did not appear groggy or non-responsive after napping. *Billingsley v. State*, 294 Ga. App. 661, 669 S.E.2d 699 (2008).

Admission of a defendant's inculpatory statement during the defendant's armed robbery trial was not an abuse of discretion based on the fact that the defendant had completed the ninth grade, the fact that the defendant acknowledged the seriousness of the crime the defendant was charged with, and the fact that the defendant also acknowledged that the defendant understood the defendant's right to counsel and the right to remain silent; the totality of the circumstances indicated that the sixteen years and nine months old defendant, gave the statement voluntarily after a knowing and intelligent waiver of the defendant's rights. *Killings v. State*, 296 Ga. App. 869, 676 S.E.2d 31 (2009).

Trial court did not err in concluding that the defendant made a knowing and

voluntary waiver of the defendant's Miranda rights, despite the testimony of the defendant's expert witness to the contrary, because: (1) the detective who interviewed the defendant testified that the defendant said that the defendant was not under the influence of alcohol or drugs; (2) the detective had experience in dealing with people under the influence of alcohol or drugs; (3) the detective saw no evidence that the defendant was under the influence of alcohol or drugs; (4) the defendant had no difficulty speaking or communicating; (5) the detective read the defendant the defendant's Miranda rights; and (6) the defendant said that the defendant understood each of the rights. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

**Revocation of waiver of right to counsel during interrogation.** — Defendant signed a Miranda waiver, later invoked the right to counsel, and still later, told another officer the defendant wanted to talk. As the defendant was re-Mirandized and re-signed the waiver of rights form, and the interviewing officer testified the officer neither made promises to the defendant nor coerced the defendant to give a statement, the defendant's confession to armed robbery was properly admitted into evidence. *Grant-Farley v. State*, 292 Ga. App. 293, 664 S.E.2d 302 (2008).

## Evidence

### 2. Admissible

**Evidence voluntarily given to police is admissible.**

Because the defendant's spontaneous outburst was voluntarily made and not the product of police interrogation, the evidence was not subject to a hearsay exception, Miranda warnings were not required, and the statement was admissible. *Tennyson v. State*, 282 Ga. 92, 646 S.E.2d 219 (2007).

Based on the totality of the circumstances and the undisputed evidence, because the defendant's confession to a police detective was voluntary and admissible under former O.C.G.A. § 24-3-50 (see now O.C.G.A. § 24-8-824), not coerced or received as a result of promises made, and not subject to exclu-

sion due to improper methods used by the police, the trial court did not err in admitting the confession; further, exclusion of the confession was not required based on a violation of the defendant's right to counsel. *Swain v. State*, 285 Ga. App. 550, 647 S.E.2d 88 (2007).

Because the evidence sufficiently showed that the defendant made a rational and intelligent choice to waive the rights outlined under *Miranda* and speak with police detectives on two separate and distinct occasions, the trial court did not err in denying a motion to suppress said statements. *Starks v. State*, 283 Ga. 164, 656 S.E.2d 518 (2008).

When the defendant asked the reason for the arrest, an officer said, child molestation; the defendant voluntarily responded that the defendant did not think the defendant had touched the child anymore. As the officer's answer had not been reasonably likely to elicit an incriminating response from the defendant, there was sufficient evidence that the defendant's statement was voluntary, not the result of interrogation, to admit the statement despite the lack of *Miranda* warnings. *Terry v. State*, 293 Ga. App. 455, 667 S.E.2d 109 (2008).

Defendant's state rights against self-incrimination were not violated because the defendant was required to turn over the defendant's clothes to the police for inspection since the defendant did not perform any act against the defendant's will to incriminate the defendant, but surrendered the clothing when asked to do so. *Simpson v. State*, 289 Ga. 685, 715 S.E.2d 142 (2011).

#### **Field sobriety tests.**

Trial court did not err in denying the defendant's motion for a new trial on grounds that a refusal to submit to voluntary field sobriety tests was testimonial in nature, and thus subject to the Fifth Amendment protection against self-incrimination, as a refusal to submit to the tests was not testimonial in nature, and the mere fact that the defendant refused to submit to a blood test was not subject to the privilege against self-incrimination since no impermissible coercion was involved, regardless of the form of refusal. *Ferega v. State*, 286 Ga. App. 808, 650

S.E.2d 286 (2007), cert. denied, 129 S. Ct. 195, 172 L.Ed.2d 140 (2008).

Because there was no evidence that an officer threatened or coerced the defendant to perform three field sobriety tests, the results of the tests were properly admitted; moreover, as the defendant was not entitled to *Miranda* warnings prior to performing an alco-sensor test, refusal to undergo the test did not violate any right against self-incrimination. *Clark v. State*, 289 Ga. App. 884, 658 S.E.2d 372 (2008).

Evidence showed that a DUI defendant voluntarily performed three field sobriety tests while the defendant was not in custody, although the defendant had been stopped by a deputy and asked to perform the tests without *Miranda* warnings. Therefore, the motion to suppress evidence from the tests was properly denied. *Bramlett v. State*, 302 Ga. App. 527, 691 S.E.2d 333 (2010).

Trial court erred in granting the defendant's motion to suppress on the basis of a *Miranda* violation because the defendant was not in custody for the purposes of *Miranda* at the time the field-sobriety tests were conducted; nothing in the deputy's words or actions would have caused a reasonable person to conclude that his or her freedom was more than temporarily curtailed pending the outcome of the investigation. *State v. Mosley*, No. A12A1830, 2013 Ga. App. LEXIS 217 (Mar. 19, 2013).

**DNA tests.** — In convictions of aggravated sodomy, kidnapping, burglary, and aggravated assault, use of evidence comparing DNA on lip balm found at the crime scene with the defendant's blood sample and with evidence retained from a prior rape prosecution, which resulted in the defendant's acquittal pursuant to former O.C.G.A. § 24-4-60 et seq. (see now O.C.G.A. § 35-3-160 et seq.) did not violate defendant's right against self-incrimination under former O.C.G.A. § 24-9-20(a) (see now O.C.G.A. § 24-5-506). *Fortune v. State*, 300 Ga. App. 550, 685 S.E.2d 466 (2009).

#### **Grant of consent for search of defendant's automobile, etc.**

Trial court properly denied the defendant's motion to suppress the marijuana

seized, as the search of the defendant's truck was conducted after a valid traffic stop after the defendant gave the officer consent to conduct the search, and nothing supported the defendant's claim that this consent was coerced because it was obtained during a custodial interrogation and without the benefit of Miranda warnings, as the officer's questioning did not unduly prolong the traffic stop and did not result in an unauthorized seizure or an equivalent custodial detention for which Miranda warnings were required. *Trujillo v. State*, 286 Ga. App. 438, 649 S.E.2d 573 (2007).

#### **Voluntary statements.**

Despite the defendant's possible intoxication, a statement given to police was knowingly and voluntarily made, and a waiver of the rights accorded under Miranda was intelligent; thus, the trial court did not err in admitting the defendant's videotaped custodial statements into evidence. *Bryant v. State*, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

A trial court properly admitted a defendant's incriminating statement into evidence, having found that the statement was freely and voluntarily made. The trial court found particularly noteworthy the fact that the interviewing officer stopped the interview to make sure the defendant understood the defendant's rights, and a mental evaluation revealed that defendant had an average intelligence quotient and was neither mentally nor cognitively impaired; even if the defendant was slow to understand the defendant's rights, this did not render the defendant's confession inadmissible. *Mezick v. State*, 291 Ga. App. 257, 661 S.E.2d 635 (2008).

Defendant's confessions to the murder of defendant's spouse made to police were voluntary: the defendant was 37 years old, could read and write, had graduated from high school, and was not under the influence of drugs or alcohol. Defendant accompanied police to the station voluntarily, was not handcuffed, and was free to leave at any time. *Turner v. State*, 287 Ga. 793, 700 S.E.2d 386 (2010).

Defendant's videotaped statement made to police during a custodial interrogation was admissible because the defendant made the statement voluntarily after

the defendant was advised of, and waived, the defendant's Miranda rights, and the defendant presented no evidence the statement was made under duress or coercion. *McCoy v. State*, 292 Ga. 296, 736 S.E.2d 425 (2013).

Statements the defendant made to police at the hospital and the police station were admissible because the defendant was not in custody at the hospital and, thus, no Miranda warnings were required, and the defendant voluntarily waived those rights at the police station. *Schutt v. State*, No. S12A2060, 2013 Ga. LEXIS 263 (Mar. 18, 2013).

**Admission of inculpatory statement was harmless error.** — Any error in the admission of a defendant's inculpatory statement was harmless beyond a reasonable doubt based on the overwhelming evidence against the defendant in an armed robbery prosecution; the defendant made inculpatory admissions at trial, the defendant met the physical description of one of the armed robbers, and the gun and proceeds from the robbery were on the defendant's person when the defendant was arrested. *Hawkins v. State*, 292 Ga. App. 76, 663 S.E.2d 406 (2008).

#### **Administrative processing.**

The trial court did not err in admitting the defendant's statements made at a hospital to a sheriff's deputy and an investigator, as the statements were given while the defendant was in a medical, rather than an investigative, setting; moreover, the fact that the officers might have suspected the defendant of having committed a murder did not render the statements at issue violative of Miranda, and thus subject to suppression. *Jennings v. State*, 282 Ga. 679, 653 S.E.2d 17 (2007).

#### **Not in custody.**

Trial court did not err in determining that the defendant was not in custody at the time the defendant made statements to an officer. While the statements were made prior to the defendant being advised of the defendant's Miranda rights, there was no evidence that the defendant had been placed under formal arrest or restrained to the degree associated with a formal arrest, the defendant was not in a police-dominated atmosphere, the defendant's mother and aunt were present dur-

ing the interview, and the temporary detention, although two hours, was not unreasonably long under the circumstances. *Tobias v. State*, 319 Ga. App. 320, 735 S.E.2d 113 (2012).

**Statement admissible after juvenile defendant did not invoke right to have parent present.** — Because the undisputed evidence established that a juvenile defendant was informed of the right to have a parent present during an interview with police in which a custodial statement was obtained, but did not invoke that right, there was no error in allowing the juvenile defendant's statement into evidence. *Green v. State*, 282 Ga. 672, 653 S.E.2d 23 (2007).

The Court of Appeals rejected the defendant's claim that the admission of statements given to a polygraph examiner had to be excluded as not freely and voluntarily given and because Miranda warnings had not been given, as: (1) the defendant was not in custody when the challenged statements were made; (2) incriminating statements were made only upon receipt of Miranda after an arrest; and (3) the confession was not given with the hope of benefit. *Ramirez v. State*, 288 Ga. App. 249, 653 S.E.2d 837 (2007).

Because the record failed to contain any indication that the defendant: (1) informed the officers of the defendant's desire to end an interview; (2) wished to speak with counsel; or (3) wished to leave the station, and after the statements were made the defendant was driven home by an officer, the defendant was not in custody for purposes of Miranda; therefore, admission of these non-custodial statements was proper. *Vaughn v. State*, 282 Ga. 99, 646 S.E.2d 212 (2007).

### 3. Inadmissible

**Instances where evidence inadmissible.**

The trial court did not err in refusing to strike a victim's testimony upon invoking a Fifth Amendment privilege against self-incrimination, because the questions posed to that victim concerning a weapon dealt with collateral matters that occurred prior to the commission of the crimes at issue. *Mercer v. State*, 289 Ga. App. 606, 658 S.E.2d 173 (2008).

While non-custodial and custodial statements were properly admitted, as not vitiating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree. *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

The trial court properly suppressed those statements made by the defendant in violation of Miranda, and after the defendant invoked the right to counsel, as the mere act of allowing the defendant to meet with an attorney did not permit law enforcement to re-initiate any conversation with the defendant at a later time without counsel present. *State v. Sammons*, 283 Ga. 364, 659 S.E.2d 598 (2008).

As a defendant's statements to an officer were inadmissible under Miranda, those portions of a videotaped conversation between the defendant and the defendant's parent that recapped the interrogation by the officer (who had told the parent of the defendant's incriminating statements) were inadmissible. However, the remaining portions of the videotape were admissible. *State v. Darby*, 284 Ga. 271, 663 S.E.2d 160 (2008).

As the state could not comment on a defendant's failure to come forward, defense counsel was ineffective in not objecting when the state elicited testimony that the defendant knew police were looking for the defendant in connection with the charged crimes, but did not contact the authorities. *Johnson v. State*, 293 Ga. App. 728, 667 S.E.2d 637 (2008).

### 4. Voluntariness

**Factors which indicate voluntariness of confession.**

A trial court properly admitted defendant's statement at trial with regard to defendant's conviction of felony murder and possession of a firearm in connection with the shooting death of another, as the evidence supported the trial court's conclusion that defendant made a knowing, voluntary, and intelligent waiver of defendant's rights before making the statement

to police; the evidence established that state of Georgia police officers went to the city in the state of Florida where defendant had fled and had been arrested and, prior to the interview, defendant was read Miranda rights and agreed to speak with the officers after informing the officers that defendant understood defendant's rights. The evidence further showed that no promises or threats were made to defendant to get defendant to speak and at no time did defendant ask for the questioning to stop. *Martinez v. State*, 283 Ga. 122, 657 S.E.2d 199 (2008).

Defendant, convicted of voluntary manslaughter, argued that because the defendant was hysterical after being told that the defendant's spouse, whom the defendant had stabbed in the chest, had died, the defendant did not understand the defendant's Miranda rights or the consequences of the defendant's statements and that those statements were thus not voluntary. This claim failed as the interviewing officer testified that the defendant understood the questions and made coherent responses and that the officer did not threaten or coerce the defendant to give a statement. *McKenzie v. State*, 294 Ga. App. 376, 670 S.E.2d 158 (2008).

Defendant's custodial statements were properly deemed voluntary under former O.C.G.A. § 24-3-50 (see now O.C.G.A. § 24-8-824). The defendant was advised of defendant's Miranda rights; signed a waiver of those rights; admitted no threats or promises were made; and, although the defendant claimed not to understand the Miranda rights due to limited mental capacity, there was no evidence the defendant was mentally or cognitively impaired. *Inman v. State*, 295 Ga. App. 461, 671 S.E.2d 921 (2009).

Although the defendant was 17 when the defendant had intercourse with a 12-year-old child, as the defendant was 18 when interrogated by police about the statutory rape, the nine-factor analysis of voluntariness set forth in *Riley v. State*, 226 S.E. 2d 922 (Ga. 1976), was inapplicable. The test that applied was whether, considering the totality of the circumstances, the statements were made voluntarily, without being induced by hope of benefit or coerced by threats. *Henry v.*

*State*, 295 Ga. App. 758, 673 S.E.2d 120 (2009).

**Voluntary statements by an accused admitted into evidence.**

The trial court did not err in admitting a defendant's custodial statement, taken when the defendant was 17, after finding that the defendant had voluntarily waived the defendant's rights and signed the statement; there was testimony that the defendant was read the Miranda rights, signed a waiver, did not ask for the defendant's parents or an attorney, did not appear to be under the influence of alcohol or drugs, that an investigator advised the defendant that the defendant would be asked questions about the crimes in question, and that the defendant was not threatened or promised leniency and read and corrected the statement. *Medlin v. State*, 285 Ga. App. 709, 647 S.E.2d 392 (2007).

The trial court properly refused to suppress a defendant's confession. The evidence enabled the trial court to find that the defendant's relative was present during most of the questioning, that the defendant was able to speak privately with the relative on occasion, that the defendant was not under the influence of drugs or alcohol, that the defendant was not threatened or offered any hope of benefits, and that the defendant was not handcuffed or otherwise restrained prior to confessing to participation in a shooting; furthermore, although the defendant claimed that the statement was not knowing and voluntary because of the defendant's limited intellect, the defendant was able to provide some involved explanations to police, a police interviewer saw no confusion about the defendant's rights, and the relative testified that the defendant never indicated that the defendant felt that the defendant had to talk to the police. *Boseman v. State*, 283 Ga. 355, 659 S.E.2d 364 (2008).

Evidence supported the trial court's finding that a defendant waived the defendant's right to counsel and that the defendant's statements to a detective were made voluntarily; thus, the statements were properly admitted into evidence. After the defendant said that the defendant wanted a lawyer, the defendant said that

the defendant would tell the detective what happened if the defendant could speak to the defendant's family; after speaking with family members, the defendant was again advised of the defendant's rights and waived those rights; and after again asking to speak to police the next day, the defendant was again advised of the defendant's rights and waived those rights. *Holmes v. State*, 284 Ga. 330, 667 S.E.2d 71 (2008).

In a statutory rape case, as the record showed that police had not misrepresented the 12-year-old victim's status to the defendant or promised that the defendant would be charged with rape only if the investigation established that the defendant had committed forcible rape, the defendant's confession and DNA test results were not inadmissible as having been obtained through trickery and deceit. *Henry v. State*, 295 Ga. App. 758, 673 S.E.2d 120 (2009).

Trial court did not err by determining that the defendant's response to law enforcement agents, who stopped the defendant's car at a park, that the defendant was at the park to counsel a 14-year-old-girl about the dangers of meeting men from the Internet was admissible because the trial court determined that the stop of the defendant's car was authorized by the facts before the officers as: (1) the defendant arrived at 10:00 p.m. at the isolated park location in a vehicle with a Tennessee license plate, which fit the description of the individual whom a task force was investigating; (2) the statements made by the investigating officer who stopped the defendant's vehicle and explained the reason for the stop would not objectively have been understood to be an interrogation; and (3) the statement made by the defendant was spontaneous and voluntary. Moreover, because the defendant was properly Mirandized prior to giving a later statement to the officers, the trial court did not err by admitting that statement. *Logan v.*

*State*, 309 Ga. App. 95, 709 S.E.2d 302, cert. denied, No. S11C1101, 2011 Ga. LEXIS 579; cert. denied, U.S. , 132 S. Ct. 823, 181 L. Ed. 2d 533 (2011).

Defendant's custodial statement was admissible because the statement was made during questioning prompted by the defendant after the defendant signed a written waiver of rights form. *Smith v. State*, No. S12A1978, 2013 Ga. LEXIS 258 (Mar. 18, 2013).

**Voluntary statements by an accused after using ecstasy admitted into evidence.** — Trial court did not err in denying the defendant's motion to exclude a statement made to a detective because the statement was made while the defendant was under the influence of Ecstasy and was induced by the hope of a light sentence because the defendant never told the detective that the defendant had taken Ecstasy a few hours earlier and the detective credibly testified that no promise of leniency was made. *Leonard v. State*, 292 Ga. 214, 735 S.E.2d 767 (2012).

**Hope of benefit not created.** — In a prosecution for felony murder, armed robbery, and burglary, a defendant's post-Miranda statements were properly admitted at trial as a detective's telling the defendant the detective knew the defendant was not the shooter did not constitute the hope of a lighter sentence that tainted the voluntariness of the defendant's statements. *Jackson v. State*, 284 Ga. 484, 668 S.E.2d 700 (2008).

**Drug and alcohol impairment.** — Defendant's claim that a statement to police was involuntary due to drug and alcohol impairment was properly rejected as the defendant admitted during the interview to consuming only two tranquilizers due to nervousness, and the interviewers testified that the defendant did not appear to be impaired and communicated with them in a lucid and coherent manner. *Carter v. State*, 285 Ga. 394, 677 S.E.2d 71 (2009).

## RESEARCH REFERENCES

**ALR.** — What constitutes "custodial interrogation" by police officer within rule

of *Miranda v. Arizona* requiring that suspect be informed of his or her federal

constitutional rights before custodial interrogation — at suspect's or third party's residence, 28 ALR6th 505.

What constitutes "custodial interrogation" of adult by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at police station or sheriff's office, where defendant voluntarily appears or appears at request of law enforcement personnel, or where unspecified as to circumstances upon which defendant is present, 29 ALR6th 1.

What constitutes "custodial interrogation" of adult by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at police station or sheriff's office, where defendant voluntarily appears or appears at request of law enforcement personnel, or where unspecified as to circumstances upon which defendant is present, 30 ALR6th 103.

What constitutes "custodial interrogation" at hospital by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation — suspect hospital visitor, not patient, 31 ALR6th 465.

What constitutes "custodial interrogation" of adult by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at police station or sheriff's office, where defendant is escorted or accompanied by law enforcement personnel, or is otherwise at station or office involuntarily, 32 ALR6th 1.

What constitutes "custodial interrogation" by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — at police vehicle, where defendant

outside, but in immediate vicinity, 34 ALR6th 1.

What constitutes "custodial interrogation" by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — at police vehicle, where defendant in moving vehicle, or where unspecified as to whether vehicle moving or stationary, 35 ALR6th 127.

What constitutes "custodial interrogation" within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — in jail or prison, 38 ALR6th 97.

Propriety of using otherwise inadmissible statement, taken in violation of *Miranda* rule, to impeach criminal defendant's credibility — state cases, 42 ALR6th 237.

What constitutes "custodial interrogation" by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — upon hotel property, 45 ALR6th 337.

Suppression of statements made during police interview of non-English-speaking defendant, 49 ALR6th 343.

What constitutes "custodial interrogation" within rule of requiring that suspect be informed of his federal constitutional rights before custodial interrogation — private security guards, detectives, or police, 51 ALR6th 219.

What constitutes "custodial interrogation" by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — at nonpolice vehicle for traffic stop, where defendant outside, but in immediate vicinity of vehicle, or where unspecified as to whether inside or outside of nonpolice vehicle, 55 ALR6th 513.

Construction and application of constitutional rule of *Miranda* — Supreme Court Cases, 17 ALR Fed. 2d 465.

## Paragraph XVII. Bail; fines; punishment; arrest, abuse of prisoners.

### JUDICIAL DECISIONS

#### ANALYSIS

##### GENERAL CONSIDERATION

##### BAIL

##### CRUEL AND UNUSUAL PUNISHMENT

#### General Consideration

**Cited** in *Southerland v. Ga. Dep't of Corr.*, 293 Ga. App. 56, 666 S.E.2d 383 (2008).

#### Bail

**Denial of bail not an abuse of discretion nor grounds for habeas petition.** — Petitioner charged with 16 counts of violating the Georgia RICO Act, O.C.G.A. § 16-14-1, securities fraud, and theft, who owned no assets in the United States and had allegedly funneled significant assets to Belize, where the petitioner traveled frequently, was not entitled to bail as of right under O.C.G.A. § 17-6-1(a), Ga. Const. 1983, Art. I, Sec. I, Para. XVII, or U.S. Const., amend. VIII. The denial of bail was not an abuse of discretion, and petitioner was not entitled to a writ of habeas corpus. *Constantino v. Warren*, 285 Ga. 851, 684 S.E.2d 601 (2009).

#### Cruel and Unusual Punishment

**State constitution provides same protection as Fourteenth Amendment.**

Arrestee's 42 U.S.C. § 1983 suit against a county sheriff, alleging that the arrestee was raped by a deputy at the county jail, failed as a matter of law because § 1983 relief did not extend to inadequate hiring practices, and the arrestee failed to raise a fact question as to the constitutional failure to protect, staff, and train claims against the sheriff individually; because the arrestee had not suffered a federal Eighth Amendment violation, the arrestee also had not suffered a violation under Ga. Const. 1983, Art. I, Sec. I, Para. XVII. *Boyd v. Nichols*, 616 F. Supp. 2d 1331 (M.D. Ga. 2009).

**Statutes authorizing capital punishment constitutional.**

Petitioner, a death row inmate, challenged the imposition of the death penalty, in a federal habeas petition arguing that the death penalty was being administered in a racially discriminatory manner; however, the argument failed because the statistical evidence was not so strong as to permit no inference other than that the results were the product of a racially discriminatory intent or purpose in that the death penalty was sought in 58 percent of the possible death penalty cases where the defendant was black but in only 40 percent of the cases where the defendant was white, and sought in only 25 percent of the cases where the victim was black and 54 percent of the cases where the victim was white. *Jefferson v. Terry*, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), *aff'd* in part and *rev'd* in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

**Sentence within statutory limit will not be set aside.**

Claim by the defendant that a sentence pursuant to O.C.G.A. §§ 16-6-22.2(b) and 17-10-6.1(b)(2) constituted cruel and unusual punishment because the sentence was grossly out of proportion to the severity of the crime, and that the sentence was overly severe under the circumstances, was within the exclusive jurisdiction of the Georgia Supreme Court where the claim challenged the constitutionality of the statutes themselves; as the sentence was legally authorized and within statutory limits, the sentence was upheld. *Colton v. State*, 297 Ga. App. 795, 678 S.E.2d 521 (2009).

**Cruel and unusual punishment claim waived on appeal.** — Defendant's appeal of an order denying the defendant's motion for new trial was transferred to

the court of appeals because the claim that the defendant's sentence under O.C.G.A. § 16-5-40(d)(4) for kidnapping with bodily injury violated the cruel and unusual punishments clause of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. I, Para. XVII, did not invoke the supreme court's constitutional question jurisdiction under Ga. Const. 1983, Art. VI, Sec. VI, Para. II(1); because the cruel and unusual punishment claim was not timely raised in the trial court, review of the claim's merits was waived on appeal. *Brinkley v. State*, 291 Ga. 195, 728 S.E.2d 598 (2012).

**Permissible punishment.**

Defendant failed to establish the threshold gross disproportionality inference needed to support a claim that the 10 years confinement, 10 years probation sentence imposed on the defendant violated U.S. Const. amend. VIII and Ga. Const. 1983, Art. I, Sec. I, Para. XVII; the sentence was within the sentencing range in O.C.G.A. § 16-6-4(b)(1), the 2006 amendment to O.C.G.A. § 16-6-4(b)(2) did not apply to the defendant, so it did not provide a basis for any proportionality argument, and the evidence showed that the defendant engaged in sexual intercourse with a 12-year-old child without the child's consent, and Georgia's child molestation law punished acts that were

far less severe. *Bragg v. State*, 296 Ga. App. 422, 674 S.E.2d 650 (2009).

**Life sentence for repeat offense of failing to register as sexual offender unconstitutional.** — Imposition of a mandatory sentence of life imprisonment imposed against a defendant, who was a second time offender, for failing to register as a sexual offender was held unconstitutional as grossly disproportionate to the crime of failing to register. *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008).

**Sentence of life in prison plus years consecutive for convictions of felony murder and armed robbery did not exceed the statutorily authorized maximum and did not amount to cruel and unusual punishment;** the felony murder statute, O.C.G.A. § 16-5-1, authorized a sentence of life in prison on conviction for felony murder, and the armed robbery statute, O.C.G.A. § 16-8-41, authorized a sentence of death or imprisonment for life or by imprisonment for not less than 10 nor more than 20 years. The trial court sentenced the defendant to life in prison for the felony murder conviction plus two 20-year terms, running concurrent to each other but consecutive to the felony murder sentence, for the two convictions for armed robbery, and thus the statutory maximum was not exceeded. *Washington v. State*, 285 Ga. 541, 678 S.E.2d 900 (2009).

**RESEARCH REFERENCES**

**ALR.** — When does use of pepper spray, mace, or other similar chemical irritants constitute violation of constitutional rights, 65 ALR6th 93.

Prison inmate's Eighth Amendment rights to treatment for sleep disorders, 68 ALR6th 389.

**Paragraph XVIII. Jeopardy of life or liberty more than once forbidden.**

**Cross references.** — Bail for juveniles, § 15-11-507.

**JUDICIAL DECISIONS**

**ANALYSIS**

**GENERAL CONSIDERATION**

**SEPARATE OFFENSES**

**DOUBLE JEOPARDY**

**1. IN GENERAL**

2. WHEN JEOPARDY ATTACHES  
 3. SAME TRANSACTION TEST  
 JEOPARDY AND TRIAL PROCEDURE

1. IN GENERAL
2. MISTRIALS
3. NEW TRIALS

### General Consideration

**Retrial on count quashed for second time controlled by statute.** — Retrial of a charge of possession of a firearm by a convicted felon would not itself violate double jeopardy or any other constitutional right since the right not to be prosecuted on a count which was quashed for the second time was purely statutory pursuant to O.C.G.A. § 17-7-53.1. *Langlands v. State*, 282 Ga. 103, 646 S.E.2d 253 (2007).

#### Venue.

Because the state failed to prove the element of venue beyond a reasonable doubt, and there was no indication in the record that the juvenile waived said requirement or that the court took judicial notice of venue as an element of the offenses charged, the juvenile's adjudications of delinquency had to be reversed. However, although the delinquency adjudications had to be reversed, the state was permitted to retry the juvenile without violating the Double Jeopardy Clause, because there was otherwise sufficient evidence at trial to support the adjudications entered. In the Interest of J.B., 289 Ga. App. 617, 658 S.E.2d 194 (2008).

**Cited in** *Usher v. State*, 290 Ga. App. 710, 659 S.E.2d 920 (2008).

### Separate Offenses

**Crimes separate for purposes of double jeopardy and multiple prosecution.**

Defendant's guilty pleas for aggravated assault with intent to rape in violation of O.C.G.A. § 16-5-21(a)(1) and kidnapping in violation of O.C.G.A. § 16-5-40(a) were not accepted in violation of the constitutional prohibition against double jeopardy because the offenses did not merge as a matter of law since each of the offenses was separate and required proof of different facts; the state asserted that the defendant had dragged the victim from the

front of a laundromat facility into a bathroom in the back of the facility, which formed a basis for the kidnapping charge, and that the defendant had sexually assaulted the victim while holding the victim in the bathroom, which formed a basis for the aggravated assault with the intent to rape charge. *Shelton v. State*, 307 Ga. App. 599, 705 S.E.2d 699 (2011).

**Defendant properly sentenced on separate counts of attempting to elude police.** — Trial court properly sentenced the defendant on five separate counts of attempting to elude a police officer because the evidence supported the jury's conclusion that the defendant willfully led police on a dangerous high speed chase after being given clear signals by five separate police vehicles to stop; it is the act of fleeing from an individual police vehicle or police officer after being given a proper visual or audible signal to stop from that individual police vehicle or officer, and not just the act of fleeing itself, that forms the proper "unit of prosecution" under O.C.G.A. § 40-6-395. *Smith v. State*, 290 Ga. 768, 723 S.E.2d 915 (2012).

### Double Jeopardy

#### 1. In General

**Modification of bond conditions were not criminal punishment for double jeopardy purposes.** — Conducting a hearing to modify the bond conditions of a third-time DUI offender and placing limitations upon the offender's driving privileges, predicated upon the necessity to protect the welfare and safety of the citizens of Georgia from a recidivist offender, was not punishment, nor was the hearing prosecution, for the purposes of double jeopardy. *Strickland v. State*, 300 Ga. App. 898, 686 S.E.2d 486 (2009).

#### **Failure to establish venue, etc.**

When the appellate court held in a juvenile delinquency case that the evidence supported the adjudication but that

the state had not proven venue, the state could retry the defendant without violating the double jeopardy clause because there was otherwise sufficient evidence at trial to support the adjudication based on the crimes charged. In the Interest of D.D., 287 Ga. App. 512, 651 S.E.2d 817 (2007).

#### **Conviction for violating municipal ordinance.**

Order barring the defendant's prosecution for aggravated assault and aggravated battery on double jeopardy grounds based on the defendant's prior guilty plea to violating a disorderly conduct ordinance, a charge arising from the same fight, was error because the defendant failed to set forth the elements of the ordinance, and failed to properly plead and prove the ordinance; Georgia courts were not allowed to take judicial notice of local ordinances, but, rather, they must have been alleged and proved by production of the original or of a properly certified copy. Further, because the defendant failed to prove below that the charges could have been brought within the jurisdiction of a single court and that the proper prosecuting attorney knew of the recorder's court proceedings, the trial court was not authorized to grant the plea in bar under O.C.G.A. § 16-1-7(b). *State v. Jeffries*, 298 Ga. App. 141, 679 S.E.2d 368 (2009).

#### **No double jeopardy found.**

As the defendant's theft by taking an automobile occurred in both Georgia and Kentucky, the fact that the defendant was prosecuted in Kentucky did not bar Georgia from also prosecuting the defendant under the dual sovereignty doctrine of the double jeopardy clause; further, O.C.G.A. § 16-1-8(c) was inapplicable because there was not a federal prosecution for the same crime. *Jackson v. State*, 284 Ga. 826, 672 S.E.2d 640 (2009).

Second indictment, which was apparently filed to address the eventuality that the defendants' motion to withdraw a guilty plea would be granted, was returned while the defendant's jeopardy was ongoing, and, as such, the indictment did not violate U.S. Const., amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, or O.C.G.A. § 16-1-8. *Phillips v. State*, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

Fact that the defendant had been convicted in federal court of possession of a firearm under 18 U.S.C. § 922 did not bar a felony murder prosecution in state court on double jeopardy grounds as the state had to prove facts in the felony murder case that were not required to be proved in the federal case. Moreover, the federal offense, which required that a firearm be possessed in and affecting interstate commerce, was not within the concurrent jurisdiction of Georgia and under O.C.G.A. § 16-1-8(c) did not bar a subsequent prosecution for felony murder predicated on the underlying firearm possession charge. *Marshall v. State*, 286 Ga. 446, 689 S.E.2d 283 (2010).

Defendant's convictions for two counts of aggravated stalking based on the defendant's following and contacting the victim did not merge for sentencing purposes because there was sufficient evidence from which the jury could find that the defendant, in violation of a protective order, both followed the victim to a hotel and then contacted the victim; the act of following was complete when the defendant arrived at the premises of the hotel because, at that time, the defendant violated the protective order by coming within 500 feet of a place where the victim was residing. *Louisyr v. State*, 307 Ga. App. 724, 706 S.E.2d 114 (2011).

**Trial court abused the court's discretion in declaring a mistrial** and abridging defendant's constitutional right to be tried by the originally impaneled jury without first considering less drastic alternatives when the assigned courtroom was unavailable at the appointed time. The procedure the court used was flawed, not the result. A trial court is not categorically required to grant a continuance under similar circumstances; merely the court should consider a continuance as an alternative to declaring a mistrial. Since the trial court told defense counsel that if the defendant did not plead guilty, the court would declare a mistrial, the court took little or no heed to *McGee's* constitutional rights thereby constituting an abuse of discretion. *McGee v. State*, 287 Ga. App. 839, 652 S.E.2d 822 (2007).

**Sentencing error corrected by Supreme Court of Georgia on appeal**

**averted double jeopardy violation.** — While the defendant was correct in asserting that the trial court should not have imposed sentence on both felony murder guilty verdicts, the Supreme Court of Georgia corrected that error on appeal when it affirmed the judgment of conviction and sentence only on the count 3 guilty verdict, and the defendant's argument was not based on what actually occurred, but upon speculation that, had the trial court imposed the correct sentence, it would have done so by merging count 3 into count 2. Thus, even assuming, arguendo, that such speculation warranted a review of the sentence imposed, such presented no basis for reversal because nothing required the trial court to merge the two counts in the way the defendant proposed. *Brady v. State*, 283 Ga. 359, 659 S.E.2d 368 (2008).

**Exclusion from drug court program did not violate double jeopardy ban.**

— Denying a defendant access to the drug court program under O.C.G.A. § 16-13-2(a), which had been a condition of the defendant's guilty plea, was not a double jeopardy violation as the trial court did not involuntarily withdraw the guilty plea, but offered the defendant the option of withdrawing the plea or accepting one of several alternative sentences. Moreover, agreeing to attend drug court was not a "sentence," and completion of the drug court contract was dependent on the defendant's completing the drug court program. *Evans v. State*, 293 Ga. App. 371, 667 S.E.2d 183 (2008).

**Failure to preserve for review.** — Court would not consider a pro se defendant's double jeopardy argument when the issue had not been raised below. *Bruster v. State*, 291 Ga. App. 490, 662 S.E.2d 265 (2008).

## 2. When Jeopardy Attaches

**Motion in limine hearing in recorder's court.** — When a recorder's court granted a defendant's motion in limine and dismissed DUI and failure to yield charges against the defendant, the state was not barred from bringing the same charges in a state court; the motion in limine hearing did not trigger double jeopardy safeguards, and because a ruling on

a motion in limine was subject to modification at trial to prevent manifest injustice, it did not result in a final judgment limiting issues under the doctrine of collateral estoppel or bar another trial. *Thomas v. State*, 287 Ga. App. 124, 650 S.E.2d 793 (2007).

**Swearing in of jury required for jeopardy to attach.** — Defendant did not receive ineffective assistance of trial counsel due to counsel's failure to object to the second trial on the ground of double jeopardy because the jury was never sworn in the first trial, and jeopardy did not attach. *Neal v. State*, 308 Ga. App. 551, 707 S.E.2d 503 (2011).

Trial court erred in holding that jeopardy had not attached on the previous charges filed against the defendant due to a mistrial because the defendant was placed in jeopardy when the jury was sworn in the first trial. *Herrington v. State*, 315 Ga. App. 101, 726 S.E.2d 625 (2012).

## 3. Same Transaction Test

### Same transaction established.

Because all of the facts used to prove the offense of aggravated assault with intent to rob were used up in proving the armed robbery, merger was required. *Mercer v. State*, 289 Ga. App. 606, 658 S.E.2d 173 (2008).

**Modified merger rule.** — Modified merger rule, which speaks to the validity of a verdict on a charge of felony murder when the jury also finds the accused guilty of voluntary manslaughter, is effective at the time the jury renders the jury's verdict and is not destroyed by the granting of a motion for new trial on the voluntary manslaughter charge; likewise, the presence or absence of a separate charge of aggravated assault in the indictment has no effect on a court's application of the modified merger rule because while the existence of a separate aggravated assault charge must be carefully considered in applying the rule and making determinations as to proper sentencing, its existence does not render the rule inapplicable. *Williams v. State*, 288 Ga. 7, 700 S.E.2d 564 (2010).

**Vacation of verdict under modified merger rule.** — There is no meaningful

distinction between an implicit acquittal based on a guilty verdict for a lesser included offense and the vacation of a verdict under the modified merger rule because in both cases the accused is placed in jeopardy, the jury is given a full opportunity to return a verdict on the greater charge, and the verdict rendered results in no conviction being entered; in both cases there can be no appeal because the accused's jeopardy has ended, and in both cases double jeopardy prevents retrial. *Williams v. State*, 288 Ga. 7, 700 S.E.2d 564 (2010).

**Conviction for violating county ordinance did not bar conviction under Code.** — Defendant's pit bull mauled a child. The defendant's conviction in recorder's court of violating a county ordinance by failing to exercise ordinary care in controlling the defendant's pet for the protection of others was sufficiently separate from a misdemeanor reckless conduct charge under O.C.G.A. § 16-5-60(b), which required proof of a gross deviation from the standard of care, that a successive prosecution for violating § 16-5-60(b) did not violate the double jeopardy ban. *State v. Stepp*, 295 Ga. App. 813, 673 S.E.2d 257 (2009).

**Guilty plea based on single incident waived double jeopardy challenge.** — Because defendant pled guilty to four misdemeanor counts of public indecency based on one lewd act witnessed by several school children, and willingly and knowingly accepted the specified sentences as to the four counts, the defendant waived any claim before the habeas court that there was in fact only one act and that the resulting sentences were void on double jeopardy grounds. *Turner v. State*, 284 Ga. 494, 668 S.E.2d 692 (2008).

## Jeopardy and Trial Procedure

### 1. In General

#### Improper termination of trial.

The trial court properly granted the defendant's plea in bar and plea of former jeopardy in a burglary prosecution, as the state improperly terminated the first trial by dismissing the indictment after jeopardy attached without the defendant's consent, and the second burglary prosecution,

although alleging a different date, residence, and accomplice, was based on the same material facts as the first indictment. *State v. Jackson*, 290 Ga. App. 250, 659 S.E.2d 679 (2008).

### 2. Mistrials

#### No double jeopardy where mistrial declared on motion of or with consent of defendant.

Trial court did not err in denying the defendant's plea in bar on the grounds of double jeopardy because the trial court's finding that the prosecutor did not intend to goad the defendant into moving for a mistrial was not clearly erroneous since the defendant's character was put in evidence by the witness's unresponsive answer to a question and not by any improper conduct of the prosecutor; the trial court was authorized to find that the state would have nothing to gain from delay and that the prosecutor was aggressively seeking a conviction, not a mistrial because the trial was at an early stage when the defendant's motion for a mistrial was granted, and the state had not yet presented the testimony of numerous other witnesses, including the alleged victims. *Appling v. State*, 305 Ga. App. 633, 700 S.E.2d 627 (2010).

#### No double jeopardy where mistrial proper.

As the trial court did not abuse the court's discretion in declaring a mistrial sua sponte on the basis that evidence inadvertently taken to the jury room which contained the defendant's exculpatory statement had irreparably prejudiced the state's right to a fair trial, and that curative instructions would be insufficient, the defendant's retrial was not barred by double jeopardy. *Varner v. State*, 285 Ga. 334, 676 S.E.2d 209 (2009).

After the trial court excused a juror who had been left a telephone message stating that the defendant was a good person, the juror discussed the evidence with the other jurors and made negative comments in an apparent effort to discredit the prosecution. As the trial court concluded that the excused juror may have had a bias that affected the other jurors, the court properly declared a mistrial; therefore, the defendant's retrial did not violate the

double jeopardy ban. *Brown v. State*, 285 Ga. 324, 676 S.E.2d 221 (2009).

Trial court did not err in denying the defendant's plea in bar because the evidence authorized the court's determination that the complained-of inquiry by the prosecutor was not intended to goad the defense into seeking a mistrial, and the record contained evidentiary support for the trial court's determination that the prosecutor's direct examination of a police officer did not show that the prosecutor was intentionally trying to abort the trial; since the evidence authorized the trial court to find that the person in control of the prosecution did not instigate any misconduct, either directly or through collusion, in order to goad the defendant into moving for a mistrial, double jeopardy did not bar retrial. *Brown v. State*, 303 Ga. App. 814, 694 S.E.2d 385 (2010).

There was no error in denying the defendant's plea in bar of former jeopardy because the trial court did not abuse the court's discretion in declaring a mistrial in the defendant's first trial because the record supported the court's finding that the jury was hopelessly deadlocked; the jurors informed the trial court early in their deliberations that their vote was nearly evenly split between conviction and acquittal, and at least three separate times, the jury also told the trial court that the jury was deadlocked and that further deliberations would not result in a verdict. *Mattox v. State*, 305 Ga. App. 600, 699 S.E.2d 887 (2010).

**Where actions of prosecutor cause mistrial.**

Trial court did not err in denying the defendant's plea of former jeopardy because the court's finding that the prosecution's question on cross-examination was an unintentional reference to the defendant's right to remain silent was not clearly erroneous; the record contained evidence to support the trial court's finding that the prosecutor's question was not intended to goad the defense into seeking a mistrial. *Demory v. State*, 313 Ga. App. 265, 721 S.E.2d 93 (2011).

**Retrial permissible only where "manifest necessity" existed for declaration of mistrial.**

Because the evidence showed that the

trial court did not consider any less drastic alternatives to declaring a mistrial for what, essentially, was the state's objection to one of the court's evidentiary rulings, the trial court erred in denying defendant's plea in bar of former jeopardy under Ga. Const. 1983, Art. I, Sec. I, Para. XVIII. *Freeman v. State*, 299 Ga. App. 564, 683 S.E.2d 124 (2009).

Defendant's plea in bar on double jeopardy grounds was properly denied because the trial court did not err in finding a manifest necessity for declaring a mistrial after defense counsel, despite being warned, argued in closing statements that the jury should distrust the breath test administered by the state trooper because the machine used had problems. *McCabe v. State*, 318 Ga. App. 720, 734 S.E.2d 539 (2012).

**3. New Trials**

**Failure to properly establish venue does not bar retrial, etc.**

Although there was sufficient evidence to support a juvenile's adjudication of delinquency based on the finding that the juvenile had committed acts, which, had the juvenile been an adult, would have supported a conviction for burglary in violation of O.C.G.A. § 16-7-1(a), the adjudication was reversed because the state failed to present any evidence to establish proof of venue beyond a reasonable doubt. The investigating officers' county of employment did not, in and of itself, constitute sufficient proof of venue to meet the beyond a reasonable doubt standard; however, the reviewing court noted that retrying the juvenile was not prohibited under the Double Jeopardy Clause, because the evidence presented at trial was otherwise sufficient to support the adjudication of delinquency. In the Interest of B.R., 289 Ga. App. 6, 656 S.E.2d 172 (2007).

**Acquittal on some offenses did not bar retrial on other offenses with different elements.** — Although a defendant was acquitted of charges relating to the beating death and kidnapping of a robbery victim in a first trial, the defendant was convicted of armed robbery and assault of the victim. On the defendant's retrial, granted due to the state's failure to prove venue in the first trial, the state

was not barred from re-prosecuting the defendant for armed robbery and assault. *Patmon v. State*, 303 Ga. App. 151, 693 S.E.2d 120 (2010).

Defendant's acquittal on felony murder under O.C.G.A. § 16-5-1(c) and aggravated assault under O.C.G.A. § 16-5-21 did not bar retrial on a voluntary manslaughter charge under O.C.G.A. § 16-5-2(a) as the collateral estoppel doctrine under the Double Jeopardy Clause, U.S. Const., amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not apply because voluntary manslaughter required proof of an element not found in felony murder or aggravated assault, and aggravated assault with a deadly weapon and voluntary manslaughter were mutually exclusive. *Roesser v. State*, 316 Ga. App. 850, 730 S.E.2d 641 (2012).

**Where defendant obtains reversal based upon "trial error," double jeopardy does not bar retrial.**

Prosecutorial misconduct did not bar a retrial of the defendant under the Double Jeopardy Clause, U.S. Const., amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, when the defendant alleged that the state made many statements of fact outside the record during closing argument in violation of O.C.G.A. § 17-8-75 as

the defendant did not allege that the prosecutor intended to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of the prosecutor's misconduct. *Wadley v. State*, 317 Ga. App. 333, 730 S.E.2d 536 (2012).

**Double jeopardy does not bar retrial.** — Double jeopardy clause in U.S. Const., amend. V and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII did not bar a second trial on the same charges because the defendant's motion for new trial was granted due to an erroneous evidentiary ruling. *State v. Caffee*, 291 Ga. 31, 728 S.E.2d 171 (2012).

**New trial granted due to erroneous evidentiary ruling.** — Trial court erred in granting the defendant's plea in bar because double jeopardy did not bar a second trial on the same charges since the retrial was granted due to an erroneous evidentiary ruling; the order granting a new trial did not find the evidence was legally insufficient to sustain the verdict, but instead, the second trial judge granted the new trial based on the original trial court's error in admitting an exhibit to prove that the defendant had a prior felony conviction after the defendant offered to stipulate that the defendant was a convicted felon. *State v. Caffee*, 291 Ga. 31, 728 S.E.2d 171 (2012).

## Paragraph XX. Conviction, effect of.

**Law reviews.** — For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in *Levenson*?", see 45 Ga. L. Rev. 877 (2011).

## Paragraph XXIII. Imprisonment for debt.

### JUDICIAL DECISIONS

#### ANALYSIS

#### GENERAL CONSIDERATION

##### General Consideration

**Criminal laws cannot be invoked to enforce payment of debts.**

Deputy did not show entitlement to official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) as to the claims of false arrest and malicious prosecution

because plaintiff offered evidence tending to show that the deputy violated Ga. Const. 1983, Art. I, Sec. I, Para. XXIII and O.C.G.A. § 51-7-20; thus, there were material fact issues precluding summary judgment. *Jordan v. Mosley*, 487 F.3d 1350 (11th Cir. 2007).

Paragraph XXIX. Enumeration of rights not denial of others.

Law reviews. — For comment, “Pay What You Like — No, Really: Why Copyright Law Should Make Digital Music

Free for Noncommercial Uses,” see 58 Emory L.J. 1495 (2009).

SECTION II.

ORIGIN AND STRUCTURE OF GOVERNMENT

Paragraph I. Origin and foundation of government.

Law reviews. — For article, “Must Government Contractors ‘Submit’ to Their Own Destruction?: Georgia’s Trade Secret Disclosure Exemption and United

HealthCare of Georgia, Inc. v. Georgia Department of Community Health,” see 60 Mercer L. Rev. 825 (2009).

OPINIONS OF THE ATTORNEY GENERAL

Representation by lawyer/legislator — Lawyer/legislator may represent the legal interests of a Georgia company on matters in other states, including political consulting and the drafting of legislation. However, even if there may not be a per se conflict of interest, a lawyer/legislator must always vigilantly guard

against such conflicts developing depending upon the facts and circumstances of each situation, especially when matters arise involving the lawyer/legislator’s own actions in the consideration of legislation within the General Assembly. 2009 Op. Att’y Gen. No. U2009-3.

Paragraph III. Separation of legislative, judicial, and executive powers.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
EXECUTIVE POWERS

General Consideration

**No separation of powers violation.** — The trial court’s order revoking a probationer’s probation did not violate the separation of powers doctrine under Ga. Const. 1983, Art. I, Sec. II, Para. III, as the probationer’s release resulted from an administrative error, and there was no evidence of any executive department finding that the probationer had fully served an imposed sentence in confinement based on a good-time allowance or otherwise. *Clark v. State*, 287 Ga. App. 176, 651 S.E.2d 106 (2007).

**Jurisdiction over sentencing cannot be legislated away.** — Trial court properly ruled that O.C.G.A. § 17-10-6, which authorized the Georgia Sentence Review Panel to review and reduce sentences, was unconstitutional as the Georgia General Assembly does not have the constitutional authority to divest the trial courts of Georgia of their traditional jurisdiction over sentencing by creating a quasi-appellate tribunal (such as the Panel) to review and alter the otherwise lawful sentences imposed by those trial courts. *Sentence Review Panel v. Moseley*, 284 Ga. 128, 663 S.E.2d 679 (2008).

Executive Powers

Parole conditions.

Habeas court erroneously addressed a defendant's challenge to a parole condition that banned the defendant from all counties in the State of Georgia but one as the habeas court's attempt to control the

parole condition was a violation of the constitutional provision regarding the separation of powers since the Board of Pardons and Paroles had executive power regarding the terms and conditions of paroles. *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008), cert. denied, 129 S. Ct. 510, 172 L.Ed.2d 375 (2008).

Paragraph VI. Superiority of civil authority.

**Law reviews.** — For note, “Rethinking the Role and Regulation of Private Military Companies: What the United States

and United Kingdom Can Learn from Shared Experiences in the War on Terror,” see 39 Ga. J. Int’l & Comp. L. 445 (2011).

Paragraph VIII. Lotteries and nonprofit bingo games.

**Law reviews.** — For article on resolutions proposing to amend this paragraph, see 23 Ga. St. U. L. Rev. 1 (2006).

Paragraph IX. Sovereign immunity and waiver thereof; claims against the state and its departments, agencies, officers, and employees.

**Cross references.** — Immunity of counties, municipalities, and school districts, Ga. Const. 1983, Art. IX, Sec. II, Para. IX.

**Law reviews.** — For survey article on administrative law, see 59 Mercer L. Rev. 1 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATIONS  
WAIVER  
APPLICATION OF TORT CLAIMS ACT  
OFFICIALS AND THEIR FUNCTIONS  
APPLICATION

General Considerations

**State courts have primary interest in adjudicating immunity claims.** — Court abstained sua sponte under 28 U.S.C. § 1334(c)(1) and dismissed a Chapter 11 debtor's complaint against a county and various officials because, inter alia, only state law claims were raised; the issues were merely “related to” a case under Title 11, and accordingly were treated as described in 28 U.S.C. § 157(c)(1); the parties had a right to a jury trial; and issues of state sovereign immunity were raised under Ga. Const.

1983, Art. I, Sec. II, Para. IX(c), which the state had a primary interest in adjudicating. *Old Augusta Dev. Group, Inc. v. Effingham County (In re Old Augusta Dev. Group, Inc.)*, No. 10-4094, 2011 Bankr. LEXIS 2587 (Bankr. S.D. Ga. May 16, 2011).  
**Cited in** Nat’l Ass’n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Ga., No. 3:07-CV-084 (CDL), 2008 U.S. Dist. LEXIS 32116 (M.D. Ga. Apr. 18, 2008); *Bd. of Regents v. Canas*, 295 Ga. App. 505, 672 S.E.2d 471 (2009); *Romano v. Ga. Dep’t of Corr.*, 303 Ga. App. 347, 693 S.E.2d 521

(2010); *Nelson v. Bd. of Regents of the Univ. Sys. of Ga.*, 307 Ga. App. 220, 704 S.E.2d 868 (2010); *Laskar v. Bd. of Regents of the Univ. Sys. of Ga.*, No. A12A1831, 2013 Ga. App. LEXIS 202 (Mar. 15, 2013).

### Waiver

**Immunity not waived by removal to federal court.** — When plaintiffs, a gun advocacy group and one of the group's members, and a church and the pastor, sought a declaratory judgment that O.C.G.A. § 16-11-127, regulating possession of weapons in a place of worship, violated their First Amendment right to the free exercise of religion, although defendant State of Georgia may have waived the state's immunity by removing the case to federal court, the state's underlying sovereign immunity against the claims remained and the state was immune from suit. *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306 (M.D. Ga. 2011), *aff'd*, 687 F.3d 1244 (11th Cir. Ga. 2012).

**No legislative act providing for waiver found.** — Plaintiff employee did not show that defendant school system waived its immunity, Ga. Const. 1983, Art. I, Sec. II, Para. IX(e), because plaintiff pointed to no legislative act providing for a waiver. In addition, because defendant superintendent was a state employee whose alleged tort was committed while acting within the scope of the defendant's employment, the defendant also was entitled to immunity under O.C.G.A. § 50-21-25(a). *Polite v. Dougherty County Sch. Sys.*, No. 07-14108, 2008 U.S. App. LEXIS 17128 (11th Cir. Aug. 11, 2008) (Unpublished).

**O.C.G.A. § 45-1-4 waives sovereign immunity.** — Trial court correctly rejected a county's claim that the whistleblower statute did not constitute a valid waiver of the sovereign immunity from suit provided to counties under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) because to the extent that employees asserted causes of action under O.C.G.A. § 45-1-4, the county's sovereign immunity was waived; the cause of action for relief set forth in § 45-1-4 unambiguously expresses a specific waiver of sovereign immunity and the extent of such waiver.

*Fulton County v. Colon*, 316 Ga. App. 883, 730 S.E.2d 599 (2012).

**County's purchase of a general liability insurance policy, etc.**

In a worker's suit alleging negligence on the part of a county with regard to the county allegedly failing to properly instruct and supervise the worker in the use of a portable tar kettle machine, the trial court erred by granting the county's motion for a judgment on the pleadings based on sovereign immunity as the worker sufficiently alleged that the machine was a vehicle as contemplated by O.C.G.A. § 33-24-51, which established a waiver of sovereign immunity if the county had purchased liability insurance to cover damages and injuries arising from the use of motor vehicles under the county's management. *Hewell v. Walton County*, 292 Ga. App. 510, 664 S.E.2d 875 (2008).

**Waiver through furnishing insurance.**

Because there was no evidence of record that a city maintained liability insurance that would cover the occurrences forming the basis of the developers' claims, there was no waiver of the city's sovereign immunity pursuant to O.C.G.A. § 36-33-1(a); thus, sovereign immunity was a viable defense as to the city and the city officials acting in their official capacities. *Wendelken v. JENK LLC*, 291 Ga. App. 30, 661 S.E.2d 152 (2008).

In determining if a county waived the county's sovereign immunity through the voluntary purchase of liability insurance under the second sentence of O.C.G.A. § 33-24-51(b), a trial court erred in considering the definition of "motor vehicle" provided in O.C.G.A. § 36-92-1; rather, "any motor vehicle" was defined as a vehicle that was capable of being driven on the public roads that was covered by a liability insurance policy purchased by the county. *Glass v. Gates*, 311 Ga. App. 563, 716 S.E.2d 611 (2011), *aff'd*, 291 Ga. 350, 729 S.E.2d 361 (2012).

**Waiver with regard to contracts did not apply to university course catalog.** — Waiver of the state's sovereign immunity with regard to contracts in writing did not apply to permit a state university student to assert breach of contract by suspending the student for theft, since the

university's undergraduate catalog, which expressly stated that it was informational rather than contractual, did not constitute a contract that could be breached. *Carr v. Bd. of Regents of the Univ. Sys.*, No. 07-10126, 2007 U.S. App. LEXIS 22715 (11th Cir. Sept. 24, 2007) (Unpublished).

**No waiver of immunity in oral contracts.** — Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) provides governmental defendants with sovereign immunity unless the immunity has been specifically waived. Even though sovereign immunity has been waived for the breach of any written contract, O.C.G.A. § 50-21-1, there has been no such waiver for oral contracts. *Soloski v. Adams*, 600 F. Supp. 2d 1276 (N.D. Ga. 2009).

**Unsigned contract document did not waive sovereign immunity.** — Computer contractor that had an unsigned copy of an agreement and an invoice for services rendered failed to show that the contractor had a signed agreement with a state agency for purposes of the state's waiver of immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c). The contractor's claims for unjust enrichment were also barred by sovereign immunity. *Ga. Dep't of Cmty. Health v. Data Inquiry, LLC*, 313 Ga. App. 683, 722 S.E.2d 403 (2012).

### Application of Tort Claims Act

**Highway design exception.** — Decedent was killed when the taxi in which the decedent was riding spun out of control on a rain-slick interstate highway and hit a tree. Assuming *arguendo* that the Georgia Department of Transportation (DOT) was immune from a negligence suit under O.C.G.A. § 50-21-24 for a city employee's negligent inspection of the taxi's tires, expert testimony that the tree's proximity to the highway may have violated generally accepted engineering standards rendered the DOT liable under § 50-21-24(10), the design standards exception. *Ga. DOT v. Heller*, 285 Ga. 262, 674 S.E.2d 914 (2009).

**Slip and fall on sidewalk.** — Trial court did not err by dismissing a pedestrian's slip and fall claims against the Georgia Department of Transportation (GDOT) based on the bar of sovereign

immunity because GDOT's specific decision to forego routine inspections, repairs, or maintenance of sidewalks within a state right-of-way as a result of prioritizing maintenance activities based on budgetary constraints fell under the discretionary function exception. *Hagan v. Ga. DOT*, No. A12A2412, 2013 Ga. App. LEXIS 237 (Mar. 20, 2013).

**Actions motivated by intent or malice.** — Georgia Tort Claims Act provided immunity from liability for torts committed during a state employee's performance of official duties without regard to intent or malice. Therefore, despite evidence that two university officials' actions in locking a suspended professor out of the professor's office and laboratory were motivated by malice and ill-intent, the officials were entitled to immunity under the Act. *Edmonds v. Bd. of Regents*, 302 Ga. App. 1, 689 S.E.2d 352 (2009), cert. denied, No. S10C0824, 2010 Ga. LEXIS 437 (Ga. 2010).

**DOC did not waive immunity by allowing counties to house state prisoners.** — County that housed state inmates in the county's prison under O.C.G.A. § 42-5-53 functioned as an independent contractor for which the state did not waive sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., and the county employees who were allegedly negligent in their handling of an inmate did not fall within the GTCA's definition of state officer or employee, O.C.G.A. § 50-21-22(7); therefore, the State Department of Corrections was entitled to be dismissed from the inmate's suit based on sovereign immunity. *Ga. Dep't of Corr. v. James*, 312 Ga. App. 190, 718 S.E.2d 55 (2011), cert. denied, No. S12C0381, 2012 Ga. LEXIS 539 (Ga. 2012).

### Officials and Their Functions

**Agent of state cannot be made party to action.**

Based on O.C.G.A. § 9-2-61, an arrestee's excessive force claim against a sheriff's major in the major's individual capacity was revived after a voluntary dismissal but assuming that the complaint alleged actual malice under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d), as

to the major's conduct, the tort claim had to be brought against the state under O.C.G.A. § 50-21-25(b); however, the state did not waive the state's sovereign immunity under O.C.G.A. § 50-21-23(b) for such claim to be brought in federal court. *Jude v. Morrison*, 534 F. Supp. 2d 1365 (N.D. Ga. 2008).

**Immunity if acts done within scope of authority and without wilfulness, fraud, malice, or corruption.**

Deputy did not show entitlement to official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) as to the claims of false arrest and malicious prosecution because plaintiff offered evidence tending to show that the deputy violated Ga. Const. 1983, Art. I, Sec. I, Para. XXIII and O.C.G.A. § 51-7-20; thus, there were material fact issues precluding summary judgment. *Jordan v. Mosley*, 487 F.3d 1350 (11th Cir. 2007).

City officials were entitled to summary judgment to the extent developers asserted claims against them in their personal capacities because the evidence was insufficient to create a jury issue on whether they acted with actual malice as required for official immunity pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) where the developers pointed to no specific evidence in the record to support the characterization of the officials' actions. *Wendelken v. JENK LLC*, 291 Ga. App. 30, 661 S.E.2d 152 (2008).

In an action alleging, inter alia, assault and false arrest, three police officers were entitled to official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) because the officers' conduct in arresting plaintiff arrestee for disorderly conduct was based on a discretionary act and was not shown to be based on actual malice; the arrestee had used expletives in telling the officers to leave the arrestee's home after the officers executed an arrest warrant for the arrestee's fiancé, and there were children who heard the offensive language outside the arrestee's home. *Sely v. Morrison*, 292 Ga. App. 702, 665 S.E.2d 401 (2008).

**Negligent performance of ministerial duty.**

In a wrongful death and nuisance suit wherein the victim was killed while trav-

eling in a taxicab on a state highway, and the taxicab had passed a mandatory city inspection the day prior, the trial court erred in granting summary judgment to the city inspector on the basis of official immunity as the inspector's act of inspecting the tires on the taxicab was a ministerial function since the inspector was required to check for minimum tread depth and complete the inspection checklist before passing the vehicle as safe, which were simple, absolute, and definite tasks of a ministerial nature. As a result, the inspector was not entitled to official immunity and it was for the jury to determine if the inspector performed the tasks negligently. *Heller v. City of Atlanta*, 290 Ga. App. 345, 659 S.E.2d 617 (2008), *aff'd*, *Ga. DOT v. Heller*, 285 Ga. 262, 674 S.E.2d 914 (2009).

Decedent was killed when the taxi in which the decedent was riding spun out of control on a rain-slick road and hit a tree. The city employee who cleared the taxi for use on the roads was not shielded from liability by the doctrine of official immunity because: (1) inspection of tires was a ministerial act; (2) the employee did nothing to verify whether the taxi's badly worn tires had the legally required minimum amount of  $\frac{3}{32}$  inch of tread on them under O.C.G.A. § 40-8-74(e)(1); and (3) the employee had no "discretion" to ignore this minimum legal requirement. *Ga. DOT v. Heller*, 285 Ga. 262, 674 S.E.2d 914 (2009).

In a parent's wrongful death action, a trial court erred in granting a county road superintendent summary judgment on the ground that the superintendent was entitled to official immunity because the superintendent conceded that the superintendent had actual knowledge of water pouring across a road one hour before a decedent's fatal accident, and the superintendent's knowledge of the hazardous condition on the road gave rise to a ministerial duty to take remedial action; the superintendent had discretion in the manner in which the superintendent took remedial action, but the notice the superintendent received of the dangerous condition on the road triggered a ministerial duty to act, and whether the superintendent breached such a duty was an

issue for a jury to decide. *Barnard v. Turner County*, 306 Ga. App. 235, 701 S.E.2d 859 (2010).

**Failure of sheriff to perform ministerial duty did not cause death.** — Grant of summary judgment in favor of the sheriff in a wrongful-death action brought by the decedent's spouse was appropriate under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c) because the majority of the acts complained of were discretionary. To the extent that certain acts were ministerial, the sheriff's alleged failure to perform those acts did not cause the decedent's death. *Butler v. Carlisle*, 299 Ga. App. 815, 683 S.E.2d 882 (2009), cert. denied, No. S10C0052, 2010 Ga. LEXIS 155 (Ga. 2010).

**Jury question existed as to whether police patrol was ministerial or discretionary act.** — In a wrongful death suit brought after a patrol car driven by a sheriff's deputy struck and killed the decedent, there was a jury issue as to whether the deputy's patrol of the area was a ministerial or discretionary act. *Nichols v. Prather*, 286 Ga. App. 889, 650 S.E.2d 380 (2007), cert. denied, 2007 Ga. LEXIS 766 (Ga. 2007).

**Sheriff's responsibility for rape by deputy.** — Arrestee's 42 U.S.C. § 1983 suit against a county sheriff, alleging that she was raped by a deputy at the county jail, failed as a matter of law because the sheriff was entitled to official immunity for the state law claims brought against the sheriff in the sheriff's individual capacity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d); hiring and supervision of employees was a discretionary governmental function of the county as opposed to a ministerial, proprietary, or administratively routine function. *Boyd v. Nichols*, 616 F. Supp. 2d 1331 (M.D. Ga. 2009).

**Officer not entitled to summary judgment on official immunity.** — In a suit involving an arrest, an officer was not entitled to summary judgment based on official immunity as to the arrestee's state law claims because the officer's statements, the officer's justifications for the arrest, and the orientation of the parties just before the arrest could support a jury's reasonable inference that the officer deliberately intended to wrongful arrest

or commit battery against the arrestee. *Turner v. Jones*, No. 209-013, 2011 U.S. Dist. LEXIS 119437 (S.D. Ga. Oct. 17, 2011).

## Application

### Immunity extends to counties.

Because a county enjoyed sovereign immunity from a pedestrian's negligence and nuisance claims asserted in a personal injury action against the county for its alleged failure to maintain a water meter cover, the trial court properly dismissed the claims. *Rutherford v. DeKalb County*, 287 Ga. App. 366, 651 S.E.2d 771 (2007).

Sheriff's deputy chased a parent who was carrying a baby; the two struggled for the deputy's gun, which discharged, killing the baby. As there was no evidence that the county waived the county's sovereign immunity, the sheriff's department was entitled to summary judgment on an estate's respondeat superior claim. *Russell v. Barrett*, 296 Ga. App. 114, 673 S.E.2d 623 (2009).

County board of elections (BOE) and board members were entitled to sovereign immunity on a candidate's claims that they violated the candidate's rights under the Georgia Constitution and that they conspired to commit fraud against the candidate by attempting to have the candidate's name removed from the ballot in an election for county commissioner; the candidate cited no act of the General Assembly that would permit recovery on the state law claims against the county, the BOE, or the board members in their official capacities. *Johnson v. Randolph County*, 301 Ga. App. 265, 687 S.E.2d 223 (2009).

Trial court correctly ruled that sovereign immunity barred a parent's wrongful claim against a county because the county did not waive the county's sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e); the bar of sovereign immunity neither results in a deprivation of property without just compensation nor constitutes a denial of equal protection or due process under the federal or state constitutions. *Barnard v. Turner County*, 306 Ga. App. 235, 701 S.E.2d 859 (2010).

Sovereign immunity barred the claimants' personal injury and nuisance claims

against the members of a county board of commissioners in the commissioners' official capacities because the claimants did not show that the county waived the county's sovereign immunity with regard to the county's operation of a mosquito control helicopter which sprayed one of the claimants with chemicals. *Bd. of Comm'rs v. Johnson*, 311 Ga. App. 867, 717 S.E.2d 272 (2011).

**City manager had official immunity.** — City manager had official immunity in a defamation case under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) and O.C.G.A. § 36-33-4 since: (1) the city finance director did not show that a statement the city manager made to the media regarding the city manager's concerns in the city finance director's department was outside the scope of the city manager's authority; (2) the city manager did not disclose anything to the city finance director's prospective employer that the prospective employer did not obtain through a Georgia Open Records Act, O.C.G.A. § 50-18-70 et seq., request; and (3) there was no policy that prohibited the city manager from verbally responding in conjunction with the city manager's Open Records Act response. *Smith v. Lott*, 317 Ga. App. 37, 730 S.E.2d 663 (2012).

**Sovereign immunity applied to city.**

When officers arrested a decedent who died shortly after the arrest, a city which employed one of the officers could not be held liable because: (1) the city was immune from claims involving police work unless the city waived that immunity; and (2) it was not shown that the city waived immunity. *Hoyt v. Bacon County*, No. 509-026, 2011 U.S. Dist. LEXIS 7330 (S.D. Ga. Jan. 26, 2011).

**Driver of emergency response vehicles.**

In a tort action for personal injuries and property damage arising from an auto collision filed against a city and its police officer, the trial court properly granted summary judgment to the officer, given that the officer was engaged in a discretionary function of responding to an emergency situation at the time the accident at issue occurred. *Weaver v. City of Statesboro*, 288 Ga. App. 32, 653 S.E.2d 765 (2007), cert. denied, 2008 Ga. LEXIS 221 (Ga. 2008).

**Law enforcement not entitled to immunity when actual malice used in application of excessive force.** —

When a taser was used on an arrestee standing with hands in the air at least four feet off the ground in a tree, officers were not entitled to official immunity as to the arrestee's state law claims at the motion to dismiss stage because the complaint alleged actual malice under Georgia law. *Harper v. Perkins*, No. 11-14416, 2012 U.S. App. LEXIS 4064 (11th Cir. Feb. 29, 2012) (Unpublished).

**Sheriff's department.** — Sheriff's deputy chased a parent who was carrying a baby; the two struggled for the deputy's gun, which discharged, killing the baby. As the deputy's decision to pursue the parent was a discretionary act, and there was no evidence the deputy acted with malice or intent to injure, the deputy had qualified immunity from suit under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d); therefore, an estate's claim against the sheriff's department was properly dismissed. *Russell v. Barrett*, 296 Ga. App. 114, 673 S.E.2d 623 (2009).

Sheriff's deputy chased a parent who was carrying a baby; the two struggled for the deputy's gun, which discharged, killing the baby. As operation of the sheriff's department was a discretionary governmental function, and there was no evidence of malice, the sheriff and the department were entitled to sovereign immunity on an estate's claims of failing to instruct, train, and supervise. *Russell v. Barrett*, 296 Ga. App. 114, 673 S.E.2d 623 (2009).

**Because there was no evidence that deputies acted with actual malice towards the decedent when they arrested and transferred the decedent to jail instead of the hospital, official immunity protected the sheriff and the deputies with respect to plaintiffs' state law claims.** *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291 (11th Cir. 2009).

**Sheriff's deputy entitled to qualified immunity.** — A sheriff's deputy chased a parent who was carrying a baby; the two struggled for the deputy's gun, which discharged, killing the baby. As the deputy's decision to pursue the parent was a discretionary act, and there was no

evidence the deputy acted with malice or intent to injure, the deputy had qualified immunity from suit under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d); therefore, an estate's negligence and assault and battery claims against the deputy were properly dismissed. *Russell v. Barrett*, 296 Ga. App. 114, 673 S.E.2d 623 (2009).

#### **School districts.**

Trial court properly dismissed a parent's tort claims against the school district and its employees, as they were immune from suit and excluded from the limited waiver provision under both O.C.G.A. §§ 50-21-22(5) and 50-21-23(a). Moreover, none of the alleged acts showed the malicious, wilful, or wanton conduct necessary to overcome that immunity. *Chisolm v. Tippens*, 289 Ga. App. 757, 658 S.E.2d 147 (2008), cert. denied, 129 S. Ct. 576, 172 L.Ed.2d 431 (2008).

Sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) extended to a county school district. *Foster v. Raspberry*, No. 4:08-CV-123(CDL), 2009 U.S. Dist. LEXIS 65419 (M.D. Ga. July 29, 2009).

Trial court erred in denying a school district's motion to dismiss a contractor's action seeking restitution because recovery was precluded under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c) to the extent that the restitution claim sought compensation for work that was not contemplated by the parties' multi-year contract. *Greene County Sch. Dist. v. Circle Y Constr., Inc.*, 308 Ga. App. 837, 708 S.E.2d 692 (2011).

#### **Immunity extends to school district employees.**

An appellate court's reversal of a grant of judgment on the pleadings to defendants, the members of a school board of education, a school principal, the assistant principal, and a clinic nurse in their individual capacities, was in error in a negligence suit brought by the parents of a student who was assaulted by another student; the mandated action set forth in O.C.G.A. § 20-2-1185 on the part of a school to create a safety plan was a discretionary duty rather than a ministerial duty, and while O.C.G.A. § 20-2-1184 establishes Georgia's public policy concerning the need to report timely to the appro-

priate authorities the identity of students who commit certain proscribed acts on school grounds, the statute did not create a civil cause of action for damages in favor of a victim or anyone else for the purported failure to report timely. *Murphy v. Bajjani*, 282 Ga. 197, 647 S.E.2d 54 (2007).

Sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) extended to employees of a county school district, who were sued in their official capacities. *Foster v. Raspberry*, No. 4:08-CV-123(CDL), 2009 U.S. Dist. LEXIS 65419 (M.D. Ga. July 29, 2009).

Trial court erred in denying the county school district employees' motion to set aside a default judgment entered against the employees under O.C.G.A. § 9-11-55(b) in the parents' wrongful death action because, while the employees were sued in both the employees' official and individual capacities, the parents' wrongful-death suit arose from actions the employees took in the employees' official capacities as employees of the school, and thus, the trial court erred as a matter of law in finding that the entry of the default judgment barred the employees from being able to assert that official immunity protected the employees from the parents' wrongful death action; official immunity is not a mere defense but rather an entitlement not to be sued that must be addressed as a threshold matter before a lawsuit may proceed. *Cosby v. Lewis*, 308 Ga. App. 668, 708 S.E.2d 585 (2011).

#### **Preparation of school safety plan is discretionary, not ministerial, duty.**

— The mandated action set forth in O.C.G.A. § 20-2-1185 with regard to every public school preparing a school safety plan is a discretionary duty rather than a ministerial duty; by so deciding, the Supreme Court of Georgia determined that the holding in *Leake v. Murphy*, 274 Ga. App. 219 (2005) was incorrect and such holding is overruled. *Murphy v. Bajjani*, 282 Ga. 197, 647 S.E.2d 54 (2007).

#### **Sovereign immunity applies to Board of Regents.**

Because Georgia had not waived the state's Eleventh Amendment immunity, the federal district court lacked jurisdiction to decide the student's breach of con-

tract claim against the board of regents. *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012).

**Georgia Lottery Corporation.**

Georgia Lottery Corporation (GLC) is entitled to assert sovereign immunity as a bar to a suit under Ga. Const. 1983, Art. I, Sec. II, Para. IX, and the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., because under the Georgia Lottery for Education Act, O.C.G.A. § 50-27-1 et seq., the purpose, function, and management of the GLC are indelibly intertwined with the state in a manner that qualifies the GLC for the protection of sovereign immunity as a state instrumentality; thus, the GLC must be classified as an instrumentality of the state to which sovereign immunity applies. *Kyle v. Ga. Lottery Corp.*, 290 Ga. 87, 718 S.E.2d 801 (2011).

**Immunity of a physician at a state medical college.** — Two physicians, who were faculty members at the Medical College of Georgia Children’s Medical Center, did not establish in a medical malpractice action that the physicians were entitled to qualified immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) and O.C.G.A. § 50-21-25(b), because the child whom the physicians treated at the center was a private-pay patient. Notwithstanding the physicians’ official duties as faculty members, when they acted as physicians, the physicians’ primary duty was to the child, rather than to the State of Georgia. *Jones v. Allen*, 312 Ga. App. 762, 720 S.E.2d 1 (2011).

Physician, who was a second-year fellow at the Medical College of Georgia Children’s Medical Center’s Graduate Medical Education Program, was entitled to official immunity in a medical malpractice action under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) and O.C.G.A. § 50-21-25(b) because the physician, who provided followup medical treatment to a child, was operating under the general supervision of an attending physician who was a faculty member and an employee of the Medical College of Georgia. *Jones v. Allen*, 312 Ga. App. 762, 720 S.E.2d 1 (2011).

**Community Service Act.** — When a decedent fell off a sanitation truck while performing court-ordered community service, sovereign immunity barred a wrong-

ful death claim against a county under the Community Service Act; O.C.G.A. § 42-8-71(d) does not specifically provide either that sovereign immunity is waived or the extent of the waiver, as required by Ga. Const. 1983, Art. I, Sec. II, Para. IX, and the court cannot read such a waiver into the act. *DeKalb State Court Prob. Dep’t v. Currid*, 287 Ga. App. 649, 653 S.E.2d 90 (2007), *aff’d*, *Currid v. DeKalb State Court Prob. Dep’t*, 285 Ga. 184, 674 S.E.2d 894 (2009).

County did not waive sovereign immunity under O.C.G.A. § 42-8-71(d) of the Community Service Act, O.C.G.A. § 42-8-70 et seq., in a wrongful death action because the plain language did not expressly waive sovereign immunity and the extent of any waiver was not expressed; thus, both prongs of the constitutional test under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) were not met. *Currid v. DeKalb State Court Prob. Dep’t*, 285 Ga. 184, 674 S.E.2d 894 (2009).

**Failure to provide medical care.** — In a parent’s wrongful death action, the trial court erred in denying a county’s motion for summary judgment because O.C.G.A. § 42-5-2 did not waive the county’s sovereign immunity for claims based on failure to provide medical care; § 42-5-2 does not provide an express waiver, and nothing in the statute can be read to imply a waiver. *Gish v. Thomas*, 302 Ga. App. 854, 691 S.E.2d 900 (2010).

**Inmates.** — County was not entitled to sovereign immunity in an estate’s claim arising from the death of an inmate because the county had bought the type of insurance defined in O.C.G.A. § 33-24-51; the estate claimed that the inmate’s death resulted from an officer’s negligent supervision of the inmate’s actions in maintaining a tractor by trying to replace a tire. The policy covered negligence for autos, the tractor was an auto under the statute and the policy, and the policy covered maintenance of a covered auto, which included changing a tire. *McDuffie v. Coweta County*, 299 Ga. App. 500, 682 S.E.2d 609 (2009).

Assuming, without deciding, that the defendant deputies were performing discretionary acts during the incident alleged in a plaintiff inmate’s complaint such that

the standard of liability was malice or intent to injure, the plaintiff alleged sufficient facts to meet that standard. The plaintiff sufficiently alleged malice or intent to injure on the defendants' part by accusing the defendants of beating the plaintiff while handcuffed because the plaintiff refused to make the plaintiff's bed, and the defendants therefore were not entitled to official immunity, pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX, at the dismissal stage in the litigation. *Muckle v. Robinson*, No. 2:12-CV-0061-RWS, 2013 U.S. Dist. LEXIS 8675 (N.D. Ga. Jan. 22, 2013).

**State did not waive immunity by enacting O.C.G.A. § 38-2-279.** — State employee allegedly terminated for military service could not recover against the state under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and O.C.G.A. § 38-2-279(e). The employee's claim under USERRA was barred by U.S. Const., amend. 11, and the claim under § 38-2-279 was barred by sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e). *Anstadt v. Bd. of Regents of the Univ. Sys. of Ga.*, 303 Ga. App. 483, 693 S.E.2d 868 (2010), cert. denied, No. S10C1291, 2010 Ga. LEXIS 713 (Ga. 2010).

**Damage of home due to police action.** — Trial court properly dismissed an insurance company's suit for inverse condemnation against a county because the insured's home was damaged during the exercise of police power and, thus, did not fall within the waiver of sovereign immunity set forth in Ga. Const. 1983, Art. I, Sec. II, Para. IX(e). *Amica Mut. Ins. Co. v.*

*Gwinnett County Police Dep't*, 319 Ga. App. 780, 738 S.E.2d 622 (2013).

**Actual malice not shown.** — In a suit by developers against city officials, the officials were entitled to qualified immunity. While the officials might have acted with conscious disregard of the consequences to the developers if the city's water issues with a state agency were not resolved, this did not create a jury issue as to actual malice. *Paul Wendelken v. Jenk*, No. A07A1645; No. A07A1646, 2008 Ga. App. LEXIS 489 (Mar. 18, 2008).

Parent's allegations that a county and a county road superintendent gave false statements and committed acts that were willful, intentional, fraudulent, and reckless were insufficient to state a claim that the superintendent acted with actual malice as that term was used in Ga. Const. 1983, Art. I, Sec. II, Par. IX(d); because the parent did not allege that the superintendent intended to cause a decedent's fatal accident, the parent did not state a claim for actual malice. *Barnard v. Turner County*, 306 Ga. App. 235, 701 S.E.2d 859 (2010).

**Factual issue regarding actual malice.** — When an investigator added a pawn shop owners' home address to a search warrant without the magistrate judge's approval, the investigator and the sheriff were properly denied summary judgment based on official immunity under Georgia law because there were genuine issues of fact regarding whether the investigator acted with actual malice and whether the sheriff knew of the investigator's actions. *Gordon v. Chattooga County*, No. 12-10818, 2012 U.S. App. LEXIS 13554 (11th Cir. July 3, 2012) (Unpublished).

## SECTION III.

### GENERAL PROVISIONS

#### Paragraph I. Eminent domain.

**Law reviews.** — For survey article on local government law, see 60 *Mercer L. Rev.* 263 (2008). For article, "Federaliza-

tion of the Mosquito: Structural Innovation in the New Deal Administrative State," see 60 *Emory L.J.* 325 (2010).

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## LIABILITY OF COUNTIES AND OTHER GOVERNMENTAL ENTITIES

## WHAT IS COMPENSABLE

1. IN GENERAL
2. EXERCISE OF POLICE POWER
9. INTERFERENCE WITH RIPARIAN RIGHTS

## COMPENSATION

1. IN GENERAL
2. MEASURE OF RECOVERY
5. INTERESTS OF LESSORS AND LESSEES

## General Consideration

**Takings clause inapplicable.** — Application of the true up process to the shortfall caused by the bankruptcy of a natural gas limited liability company (LLC) did not violate the takings clauses of U.S. Const., amend. V or Ga. Const. 1983, Art. I, Sec. III, Para. I because after the true up process had operated as intended, and after the fact, a marketer sought to obtain from the government amounts representing the marketer's commercial losses on gas delivered to the LLC's customers, and that was merely a "consequential" loss to the marketer. *MXenergy Inc. v. Ga. PSC*, 310 Ga. App. 630, 714 S.E.2d 132 (2011).

**Cited in** *Bd. of Comm'rs v. Johnson*, 311 Ga. App. 867, 717 S.E.2d 272 (2011).

## Liability of Counties and Other Governmental Entities

**County enjoyed immunity from negligence and nuisance claims.** — Because a county enjoyed sovereign immunity from a pedestrian's negligence and nuisance claims asserted in a personal injury action against the county for its alleged failure to maintain a water meter cover, the trial court properly dismissed the claims; however, a personal injury for purposes of inverse condemnation did not constitute personal property that could be taken. *Rutherford v. DeKalb County*, 287 Ga. App. 366, 651 S.E.2d 771 (2007).

**Inverse condemnation claim against city failed as matter of law.** — Plaintiffs asserted an inverse condemnation claim, alleging that damage to their property caused by a city's proposed con-

struction of sidewalks deprived the plaintiffs of property without due process in violation of Ga. Const. 1983, Art. I, Sec. III, Para. I(a). This claim failed as a matter of law because the city never began construction on the proposed sidewalk installation project and the city did not interfere with the plaintiffs' right to use their property. *Bailey v. City of Atlanta*, 296 Ga. App. 679, 675 S.E.2d 564 (2009).

## What is Compensable

## 1. In General

**Right to damages for inverse condemnation.**

It was error to award a developer damages on its inverse condemnation claim because the developer had not shown a compensable taking. Although there was a delay in developing the six lots at issue, the developer was not prevented from marketing and developing its subdivision or from making other uses of the six lots; all required approvals had occurred for the six lots; and the six lots had maintained their value. *Prime Home Props., LLC v. Rockdale County Bd. of Health*, 290 Ga. App. 698, 660 S.E.2d 44 (2008), cert. denied, No. S08C1330, 2008 Ga. LEXIS 685 (Ga. 2008).

## 2. Exercise of Police Power

**Compensation not required upon exercise of police power.**

Trial court properly dismissed an insurance company's suit for inverse condemnation against a county because the insured's home was damaged during the exercise of police power and, thus, did not fall within the waiver of sovereign immu-

nity set forth in Ga. Const. 1983, Art. I, Sec. II, Para. IX(e). *Amica Mut. Ins. Co. v. Gwinnett County Police Dep't*, 319 Ga. App. 780, 738 S.E.2d 622 (2013).

## 9. Interference with Riparian Rights

**Lay opinion testimony on cost to build a bridge.** — Trial court did not abuse the court's discretion in excluding, for insufficient foundation, a witness's opinion testimony concerning the cost to build a bridge over a waterway to cure trusts' lost usage after the condemnation of a ford over the waterway because the proffer the trusts made did not demonstrate pursuant to former O.C.G.A. § 24-9-66 (see now O.C.G.A. § 24-7-701) a basis upon which the witness could have formed the witness's own opinion on the cost to build the bridge apart from the single estimate the witness received; the trusts did not proffer that the witness obtained any other estimates concerning the cost to construct the bridge, spoke to anyone else about that cost, or possessed or sought to obtain any other information about that cost or about the accuracy of the estimate the witness had received. *Martha K. Wayt Trust v. City of Cumming*, 306 Ga. App. 790, 702 S.E.2d 915 (2010).

**Evidence concerning the value of stream mitigation credits inadmissible.** — Trial court did not err in excluding, as a component of the market value of condemned property, evidence concerning the value of stream mitigation credits that trusts intended to sell in connection with the condemned property because the trusts failed to show how the value of stream mitigation credits was relevant to the sole issue of just and adequate compensation when at the time of the taking, the proposed stream mitigation bank had not yet been created on the condemned property, and no stream mitigation credits had been awarded; no evidence was presented to show that the proposed future use of the property as a stream mitigation bank, or the value of stream mitigation credits it could have generated, had an effect on market value. *Martha K. Wayt Trust v. City of Cumming*, 306 Ga. App. 790, 702 S.E.2d 915 (2010).

## Compensation

### 1. In General

**Right of first refusal to acquire real property was not compensable.** — Inasmuch as an option does not confer upon the holder an interest in the property, it stands to reason that the possessor of a right of first refusal would not, just by virtue of holding the refusal right, obtain a legally compensable interest in the property itself. *Robinson v. Gwinnett County*, 290 Ga. 470, 722 S.E.2d 59 (2012).

Holders' right of first refusal to acquire real property was not compensable under Ga. Const. 1983, Art. I, Sec. III, Para. I because at the time of the condemnation, the refusal right under the agreement between the executor and the holders was not invoked or sought to be enforced; the condemnation did not trigger the holders' refusal right since it was unrelated to any choice by the executor to market the property, but rather it was a forced and compulsory sale to the condemning authorities, apparently not contemplated in the agreement. *Robinson v. Gwinnett County*, 290 Ga. 470, 722 S.E.2d 59 (2012).

### 2. Measure of Recovery

#### Damages.

Trial court did not err in entering a final judgment on a jury verdict awarding a company and a bank damages in a county's condemnation action because there was no evidence presented of pre-taking damages in anticipation of the taking; the trial court's jury instructions properly explained how the jury was to calculate damages. *Gwinnett County v. Ascot Inv. Co.*, 314 Ga. App. 874, 726 S.E.2d 130 (2012).

Trial court did not commit a manifest abuse of discretion when the court allowed evidence that, as a result of the taking of property, it was no longer feasible to construct student housing because a company and a bank presented expert testimony that the property's value at the time of the taking was affected by the property's probable future use for student housing. *Gwinnett County v. Ascot Inv. Co.*, 314 Ga. App. 874, 726 S.E.2d 130 (2012).

**Knowledge of condemnation at purchase.** — In a condemnation proceeding,

the trial court did not abuse the court's discretion in denying the lessees' motion in limine to exclude evidence that the lessees and the lessor knew of the possible condemnation when the lessees sold the property to the lessor because the Georgia Department of Transportation (DOT) sought to use the evidence to discredit the estimate the lessees and lessor made of the property's market value at the time of the taking by challenging the use of the sale as a factor in reaching that estimate used in that way, the evidence of the knowledge of a possible condemnation would bear, at least indirectly, on the question of the just and adequate compensation due the condemnees. *CNL APF Partners, LP v. DOT*, 307 Ga. App. 511, 705 S.E.2d 862 (2010).

## 5. Interests of Lessors and Lessees

**Evidence of offer of compromise.** — In a condemnation proceeding, the trial court did not err in denying the lessees' motion in limine to exclude evidence of an alleged pre-condemnation offer of compromise contained in a letter because the letter, which was sent to an appraiser and not to the Georgia Department of Trans-

portation, was not an inadmissible offer of compromise under former O.C.G.A. § 24-3-37 (see now O.C.G.A. § 24-4-408); no condemnation proceeding was pending when the letter was sent, the terms of the letter sought to persuade against the condemnation of the property, or, alternatively, to ensure that the lessees would receive the full amount that the lessees believed would be the lessees' just and adequate compensation if condemnation occurred, and the letter did not propose a compromise of that amount. *CNL APF Partners, LP v. DOT*, 307 Ga. App. 511, 705 S.E.2d 862 (2010).

**Cause of fire relevant to issue of just and adequate compensation.** — In a condemnation proceeding, the trial court erred in denying the lessees' motion in limine to exclude evidence of the cause of the fire that damaged the restaurant that was on the real property at issue because evidence concerning the reasons giving rise to the uncertainty in insurance coverage (i.e., the cause of the fire), as opposed to the fact of uncertainty, was not relevant to the issue of just and adequate compensation. *CNL APF Partners, LP v. DOT*, 307 Ga. App. 511, 705 S.E.2d 862 (2010).

## RESEARCH REFERENCES

**ALR.** — Application of *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), to "Public Use" restrictions in federal and state constitutions takings clauses and eminent domain statutes, 21 ALR6th 261.

Validity of extraterritorial condemnation by municipality, 44 ALR6th 259.

Elements and measure of compensation in eminent domain proceeding for temporary taking of property, 49 ALR6th 205.

Zoning scheme, plan, or ordinance as temporary taking, 55 ALR6th 635.

## SECTION IV.

### MARRIAGE

**Cross references.** — Marriage, T. 19, C. 3.

Lawrence, and Liberty," see 27 Ga. St. U. L. Rev. 609 (2011).

**Law reviews.** — For article, "Lochner,

## Paragraph I. Recognition of marriage.

**Law reviews.** — For article, "A Holy Secular Institution," see 58 Emory L.J. 1123 (2009).

## ARTICLE II.

### VOTING AND ELECTIONS

#### SECTION I.

#### METHOD OF VOTING; RIGHT TO REGISTER AND VOTE

##### Paragraph I. Method of voting.

##### JUDICIAL DECISIONS

**Methods of voting.** — Nothing in Ga. Const. 1983, Art. II, Sec. I, Para. I limits voting to some method or methods under which each voter indicates his or her choice or choices on a separate piece of paper issued to him or her for that purpose because it contemplates that the legislature shall provide a method, or methods, of voting at elections in such a way that not even those who count or tabulate the votes will know how any particular voter voted; those portions of direct recording electronic equipment which store and count the number of votes do not vitiate the nature of elections as “by the

people” but simply take the place of ballot boxes and human counters. *Favorito v. Handel*, 285 Ga. 795, 684 S.E.2d 257 (2009).

In an action by a political party challenging the 2006 Photo ID Act, amending O.C.G.A. § 21-2-417, the photo ID requirement for in-person voting was authorized by Ga. Const. 1983, Art. II, Sec. I, Para. I, as a reasonable procedure for verifying that the individual appearing to vote in person was actually the same person who registered to vote. *Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 707 S.E.2d 67 (2011).

##### Paragraph II. Right to register and vote.

**Law reviews.** — For article, “The 2011 Randolph W. Thrower Symposium: Judging Politics: Judges as Political Actors, Candidates, and Arbiters of the Political: Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Su-

preme Court Justices Move the Law,” see 61 *Emory L.J.* 779 (2012). For article, “Reasonable Restrictions on the Franchise: Georgia’s Voter Identification Act of 2006,” see 63 *Mercer L. Rev.* 1129 (2012).

##### JUDICIAL DECISIONS

**No standing to challenge constitutionality.** — Plaintiff lacked standing to challenge the constitutionality of the 2006 Photo-ID Act at the time the complaint was filed, and thus the determination that the act violated Ga. Const. 1983, Art. II, Sec. I, Paras. II and III had to be vacated; the plaintiff could have voted in person

under O.C.G.A. § 21-2-417 without a photo identification, as the plaintiff did not contend that the plaintiff lacked any of the forms of non-photo identification allowed to be shown by first-time voters. *Perdue v. Lake*, 282 Ga. 348, 647 S.E.2d 6 (2007).

##### Paragraph III. Exceptions to right to register and vote.

**Law reviews.** — For article, “Reasonable Restrictions on the Franchise: Geor-

gia’s Voter Identification Act of 2006,” see 63 *Mercer L. Rev.* 1129 (2012).

JUDICIAL DECISIONS

**No standing to challenge constitutionality.** — Plaintiff lacked standing to challenge the constitutionality of the 2006 Photo-ID Act at the time the complaint was filed, and thus the determination that the act violated Ga. Const. 1983, Art. II, Sec. I, Paras. II and III had to be vacated; the plaintiff could have voted in person under O.C.G.A. § 21-2-417 without a photo identification, as the plaintiff did not contend that the plaintiff lacked any of the forms of non-photo identification

allowed to be shown by first-time voters. *Perdue v. Lake*, 282 Ga. 348, 647 S.E.2d 6 (2007).

**Photo identification requirement.** — In an action by a political party challenging the 2006 Photo ID Act, amending O.C.G.A. § 21-2-417, no voter was disenfranchised by the Act and, therefore, the Act did not violate Ga. Const. 1983, Art. II, Sec. I, Para. III. *Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 707 S.E.2d 67 (2011).

SECTION II.

GENERAL PROVISIONS

Paragraph III. Persons not eligible to hold office.

JUDICIAL DECISIONS

**Cited in** *Spillers v. State*, 299 Ga. App. 854, 683 S.E.2d 903 (2009).

ARTICLE III.

LEGISLATIVE BRANCH

Section

VI. Exercise of Powers.

**Law reviews.** — For article, “Limiting Article III Standing to ‘Accidental’ Plaintiffs: Lessons from Environmental and

Animal Law Cases,” see 45 Ga. L. Rev. 1 (2010).

SECTION I.

LEGISLATIVE POWER

Paragraph I. Power vested in General Assembly.

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GENERAL CONSIDERATION

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**Cited in** *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008).

SECTION V.  
ENACTMENT OF LAWS

Paragraph III. One subject matter expressed.

**Law reviews.** — For article, “Federalization of the Mosquito: Structural Innovation in the New Deal Administrative State,” see 60 Emory L.J. 325 (2010).

JUDICIAL DECISIONS

ANALYSIS

SPECIFIC LAWS

- 3. AMENDMENTS
- 5. MUNICIPAL ORDINANCES

Specific Laws

3. Amendments

**Amendment to § 34-9-13(e) of Workers’ Compensation Act unconstitutional.** — 1989 amendment to O.C.G.A. § 34-9-13(e) is unconstitutional since the alteration greatly limited availability of workers’ compensation benefits to surviving spouses and was enacted in legislation that had the object and title reflecting a purpose of correcting only grammatical errors and to modernize language in various statutes—all non-substantive alterations; 1989 amendment to § 34-9-13(e), which greatly limited the availability of benefits to surviving spouses, was a substantive alteration made in violation of Ga. Const. 1983, Art. III, Sec. V, Para. III. *Sherman Concrete Pipe Co. v. Chinn*, 283 Ga. 468, 660 S.E.2d 368 (2008).

5. Municipal Ordinances

**Charter regulating occupation tax.** — Because a second city provided by local

ordinance for the levy, assessment, and collection of an occupation tax on businesses and practitioners operating within that city’s limits, the second city had the general authority to collect such a tax under O.C.G.A. § 48-13-6(b), and only the second city was authorized to levy, assess, and collect an occupation tax from businesses and practitioners at the airport that were located within the second city’s limits to the extent consistent with Ga. Const. 1983, Art. IX, Sec. IV, Para. I, O.C.G.A. § 48-13-6(b), other applicable statutes, and that city’s own charter, ordinances, and regulations; *Atlanta, Ga., Charter*, § 7-105(f) is ineffective to the extent it purports to divest College Park, Georgia of the authority to levy, assess, and collect an occupation tax on those businesses and practitioners operating at the airport and within the city limits of College Park. *City of Atlanta v. City of College Park*, 311 Ga. App. 62, 715 S.E.2d 158 (2011).

SECTION VI.  
EXERCISE OF POWERS

Paragraph  
V. Specific limitations.

Paragraph I. General powers.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
SPECIFIC CASES

General Consideration

**Cited** in *Crump Ins. Servs. v. All Risks, Ltd.*, 315 Ga. App. 490, 727 S.E.2d 131 (2012).

Specific Cases

**Adoption.** — Trial court abused the court’s discretion by denying a foster parent’s petition to adopt the foster child on the ground that placing the child with the foster parent violated the state’s public policy because all of the evidence showed

that the adoption would be in the child’s best interest, and the trial court failed to apply the law as written and determine whether it was in the child’s best interest to allow the adoption; as long as the adoption laws are constitutional, neither the superior court nor the court of appeals has the authority to amend the law to establish what the court deems are better qualifications for those seeking to adopt. In *re Goudeau*, 305 Ga. App. 718, 700 S.E.2d 688 (2010).

OPINIONS OF THE ATTORNEY GENERAL

**Georgia Public Defenders Standards Council.** — The General Assembly was authorized to move the Georgia Public Defenders Standards Council from the

judicial branch of government to the executive branch. 2009 Op. Att’y Gen. No. 2009-2.

Paragraph II. Specific powers.

JUDICIAL DECISIONS

**Cited** in *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683, 733 S.E.2d 269 (2012).

Paragraph IV. Limitations on special legislation.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
UNIFORM OPERATION  
SPECIAL LAWS  
CLASSIFICATION  
2. BY POPULATION  
MUNICIPAL ORDINANCES  
COUNTY COMMISSIONERS

### General Consideration

**Cited in** *Wheatley v. Moe's Southwest Grill, LLC*, 580 F. Supp. 2d 1324 (N.D. Ga. 2008); *Smart v. State*, 318 Ga. App. 882, 732 S.E.2d 850 (2012).

### Uniform Operation

#### Requirements for constitutional uniformity.

O.C.G.A. § 51-1-29.5(c) does not violate the uniformity provision of the Georgia Constitution, Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), because it is a general law; it operates uniformly upon all health care liability claims arising from emergency medical care, and classification of the designated class is neither arbitrary nor unreasonable. *Gliemmo v. Cousineau*, 287 Ga. 7, 694 S.E.2d 75 (2010).

**O.C.G.A. § 9-11-68 is a general law and does not violate the uniformity clause.** — The Tort Reform Act of 2005, O.C.G.A. § 9-11-68, does not violate the uniformity clause of the Georgia Constitution, Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), because § 9-11-68 is a general law since it applies uniformly throughout the state to all tort cases; the purpose of the general law to encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation is a legitimate legislative purpose, consistent with the state's strong public policy of encouraging negotiations and settlements, and the fact that the statute applies to tort cases, but not other civil actions, does not render it an impermissible special law. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

### Special Laws

**War on Terrorism Local Assistance Act.** — Legislation enacting the War on Terrorism Local Assistance Act, O.C.G.A. § 36-75-11(c), does not violate Ga. Const. 1983, Art. III, Sec. VI, Par. IV because the legislation and § 36-75-11(c) are logically related and do not embrace discordant subjects when the legislation generally pertains to public safety and judicial facilities authorities, and § 36-75-11(c) applies to authorities in counties that have activated public safety and judicial facilities

authorities; it was the legislature's decision to enact a statute imposing a referendum requirement on any authority that has been authorized to incur bonded indebtedness in a county with an activated public safety and judicial facilities authority when that authority has constructed or operates buildings or facilities for use by a department, agency, division or commission of such county. *Dev. Auth. v. State*, 286 Ga. 36, 684 S.E.2d 856 (2009).

### Classification

#### 2. By Population

#### Classification by population permitted.

O.C.G.A. § 15-9-120(2), granting the right to a jury trial in the probate courts of counties with a certain population according to the 1990 decennial census "or any future such census", was not an unconstitutional special law, under Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), because the statute's use of the disjunctive "or" gave the statute the elasticity required to make the statute a general law as this allowed counties to move into or out of this class of counties according to the latest census. *Ellis v. Johnson*, 291 Ga. 127, 728 S.E.2d 200 (2012).

### Municipal Ordinances

**City ordinance regarding discontinuance of water service pre-empted.** — Pursuant to the uniformity clause of Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), § 154-120(1) of the Code of Ordinances of the City of Atlanta, Ga., which authorized the discontinuance of water service until a bill was paid, was pre-empted by O.C.G.A. § 36-60-17(a), which did not allow a supplier to refuse to supply water to a water meter because of a prior owner's indebtedness. *Fed. Home Loan Mortg. Corp. v. City of Atlanta*, 285 Ga. 189, 674 S.E.2d 905 (2009).

**City ordinance regulating age of persons who could enter adult entertainment establishments.** — Trial court erred by rejecting entertainers' challenge under the uniformity clause, Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), to a city's ordinance prohibiting persons aged 18 to 21 from entering adult entertain-

ment establishments where alcohol was served because the ordinance conflicted with O.C.G.A. § 3-3-24(a), allowing persons over 18 to work in such establishments. *Willis v. City of Atlanta*, 285 Ga. 775, 684 S.E.2d 271 (2009).

**Ordinance did not impair operation of state law.** — Definition of “public sidewalk” found in City of Forest Park, Ga., Ordinance § 9-8-45(f) is not unconstitutional as conflicting with state law because nothing in § 9-8-45 impairs the operation of O.C.G.A. § 40-1-1(57); by its specific terms, § 40-1-1(57), is not intended to be a definition of general application, but defines the term “sidewalk” in the context of Title 40 of the Georgia Code, which is labeled “Motor Vehicles and Traffic,” and it does not appear that the definition set forth in § 40-1-1(57) would apply elsewhere in the Code in which the word “sidewalk” is used in other contexts. *Braley v. City of Forest Park*, 286 Ga. 760, 692 S.E.2d 595 (2010).

**Ordinance not preempted by statute.** — Miller County, Ga., Ordinance No. 10-01, § 3 could not be preempted by O.C.G.A. § 36-1-14 because § 3 did not

impair the statute’s operation but rather strengthened and augmented the statute; the exception in § 3 was more narrow than in O.C.G.A. § 36-1-14, requiring that a majority of the Board of Commissioners of Miller County approve the contract or transaction after establishing that the goods, and the County had authority, as an incident of the county’s home rule power, to amend Ga. L. 1983, p. 4594, § 14. *Bd. of Comm’rs v. Callan*, 290 Ga. 327, 720 S.E.2d 608 (2012).

#### County Commissioners

**Local law invalidated in compensation dispute.** — Trial court correctly held that a county solicitor general was improperly compensated beginning in July 2007 but erred in calculating the back pay due to him as of January 1, 2009, based on an amended local law because the amended local law irreconcilably conflicted with O.C.G.A. § 15-18-67(b), which prohibited the reduction of a solicitor-general’s compensation during his term of office. *Inagawa v. Fayette County*, 291 Ga. 715, 732 S.E.2d 421 (2012).

### Paragraph V. Specific limitations.

(a) The General Assembly shall not have the power to grant incorporation to private persons but shall provide by general law the manner in which private corporate powers and privileges may be granted.

(b) The General Assembly shall not forgive the forfeiture of the charter of any corporation existing on August 13, 1945, nor shall it grant any benefit to or permit any amendment to the charter of any corporation except upon the condition that the acceptance thereof shall operate as a novation of the charter and that such corporation shall thereafter hold its charter subject to the provisions of this Constitution.

(c)(1) The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of encouraging a monopoly, which is hereby declared to be unlawful and void. Except as otherwise provided in subparagraph (c)(2) of this Paragraph, the General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, which is hereby declared to be unlawful and void.

(2) The General Assembly shall have the power to authorize and provide by general law for judicial enforcement of contracts or agreements restricting or regulating competitive activities between or among:

- (A) Employers and employees;
- (B) Distributors and manufacturers;
- (C) Lessors and lessees;
- (D) Partnerships and partners;
- (E) Franchisors and franchisees;
- (F) Sellers and purchasers of a business or commercial enterprise; or
- (G) Two or more employers.

(3) The authority granted to the General Assembly in subparagraph (c)(2) of this Paragraph shall include the authority to grant to courts by general law the power to limit the duration, geographic area, and scope of prohibited activities provided in a contract or agreement restricting or regulating competitive activities to render such contract or agreement reasonable under the circumstances for which it was made.

(d) The General Assembly shall not have the power to regulate or fix charges of public utilities owned or operated by any county or municipality of this state, except as authorized by this Constitution.

(e) No municipal or county authority which is authorized to construct, improve, or maintain any road or street on behalf of, pursuant to a contract with, or through the use of taxes or other revenues of a county or municipal corporation shall be created by any local Act or pursuant to any general Act nor shall any law specifically relating to any such authority be amended unless the creation of such authority or the amendment of such law is conditioned upon the approval of a majority of the qualified voters of the county or municipal corporation affected voting in a referendum thereon. This subparagraph shall not apply to or affect any state authority. (Ga. Const. 1983, Art. 3, § 6, Para. 5; Ga. L. 1986, p. 1628, § 1/HR 662; Ga. L. 2010, p. 1260, § 1/HR 178.)

**Cross references.** — Establishment of just and reasonable rates, fares, and charges for transportation, § 40-1-118. O.C.G.A. §§ 13-8-2; Art. 4 of Ch. 8 of T. 13.

**Editor's notes.** — The constitutional amendment (Ga. L. 2010, p. 1260, § 1),

which rewrote subsection (c), was ratified at the general election held on November 2, 2010.

**Law reviews.** — For annual survey on labor and employment law, see 64 Mercer L. Rev. 173 (2012).

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## GRANT OF CORPORATE POWERS

## CONTRACTS TO DEFEAT COMPETITION

## 2. COVENANTS NOT TO COMPETE

## B. ANCILLARY TO CONTRACT OF EMPLOYMENT

## General Consideration

**Cited** in *Atlanta Bread Co. Int'l v. Lupton-Smith*, 285 Ga. 587, 679 S.E.2d 722 (2009); *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683, 733 S.E.2d 269 (2012).

## Grant of Corporate Powers

**Restrictive covenant for subdivision.** — A restrictive covenant barring “For Sale” signs in a subdivision was not an unenforceable restraint on trade; the cases citing such authority referred to restrictive covenants in the employment area, not to restrictive covenants on the use of real property, and it was well settled that a grantor of real property could restrict the use of it by restrictive covenants. *Godley Park Homeowners Ass’n v. Bowen*, 286 Ga. App. 21, 649 S.E.2d 308 (2007).

## Contracts to Defeat Competition

## 2. Covenants Not to Compete

## B. Ancillary to Contract of Employment

**Overbroad and unreasonable covenant unenforceable.**

A noncompetition agreement that provided that an employee of a drug and alcohol testing service would not compete with the employer “in any area of business” of the employer’s, including solicitation of existing accounts, was unreasonable as overly broad and indefinite; when read as a whole, the noncompetition agreement was plainly intended to prevent any type of competing activity what-

soever, with the reference to solicitation merely being illustrative of one type of prohibited activity. *Stultz v. Safety & Compliance Mgmt.*, 285 Ga. App. 799, 648 S.E.2d 129 (2007), cert. denied, 2007 Ga. LEXIS 812 (Ga. 2007).

A non-compete clause in a Software Agreement between an employer and employee was unenforceable as a restraint of trade under Ga. Const. 1983, Art. III, Sec. VI, Para. V(c), because it was unlimited as to time and territory. However, under O.C.G.A. § 10-1-762(d), the employee was prohibited from using a software version that incorporated the employer’s trade secrets and confidential information, regardless of the non-compete clause. *Coleman v. Retina Consultants, P.C.*, 286 Ga. 317, 687 S.E.2d 457 (2009).

**Injunction enforcing restrictive covenants against employee amounted to wrongful restraint.** —

Injunction enforcing restrictive covenants against the employee amounted to a wrongful restraint under Ga. Const. 1983, Art. III, Sec. VI, Para. V(c) since the non-disclosure provisions in the form and the agreement were unenforceable on their face because the provisions were not limited in time, and Georgia law was clear that, if one covenant in an agreement subject to strict scrutiny was unenforceable, then the other covenants were all unenforceable. Therefore, the appellate court remanded the case for a determination of the amount of actual damages, if any, suffered by the employee during the period of the injunction’s enforcement. *Cox v. Altus Healthcare & Hospice, Inc.*, 308 Ga. App. 28, 706 S.E.2d 660 (2011).

Paragraph VI. Gratuities.

JUDICIAL DECISIONS

ANALYSIS

SPECIFIC CASES

Specific Cases

**Amendment to Homestead Option Sales and Use Tax not payment of gratuity.** — Trial court did not err in holding that Ga. L. 2007, p. 598, § 1 et seq., which amended the Homestead Option Sales and Use Tax (HOST) Act, O.C.G.A. § 48-8-100 et seq., was not the payment of a gratuity in violation of Ga. Const. 1983, Art. III, Sec. VI, Para. VI(a) because the equalization amount received by a city as a qualified municipality within a county special tax district clearly represented the share of homestead op-

tion sales and use tax capital outlay proceeds the legislature determined the city's residents were entitled to receive; therefore, that share was not a gift in violation of Ga. Const. 1983, Art. III, Sec. VI, Para. VI(a); under the Homestead Option Sales and Use Tax Act, O.C.G.A. § 48-8-100 et seq., as amended, the city, just like the county, would act as an agent for the special tax district coterminous with the geographical boundaries of the county in expending HOST revenues for capital outlay projects that benefited the special tax district. *DeKalb County v. Perdue*, 286 Ga. 793, 692 S.E.2d 331 (2010).

Paragraph VII. Regulation of alcoholic beverages.

**Law reviews.** — For article, "Regulation of Alcoholic Beverages Generally," see 28 Ga. St. U. L. Rev. 255 (2011).

SECTION IX.

APPROPRIATIONS

Paragraph I. Public money, how drawn.

JUDICIAL DECISIONS

**Cited** in *Stalling v. State*, 312 Ga. App. 154, 717 S.E.2d 733 (2011).

Paragraph VI. Appropriations to be for specific sums.

**Cross references.** — Provider Payment Agreement Act, § 31-8-179 et seq.

**Editor's notes.** — The constitutional amendment proposed by Ga. L. 2010, p. 1261, § 1, which would have added sub-

paragraph (o) to add a \$10.00 tag fee on private passenger vehicles for state-wide trauma care, was defeated at the general election held on November 2, 2010.

ARTICLE IV.

CONSTITUTIONAL BOARDS AND COMMISSIONS

SECTION I.

PUBLIC SERVICE COMMISSION

Paragraph I. Public Service Commission.

OPINIONS OF THE ATTORNEY GENERAL

**O.C.G.A. § 46-2-5 is constitutional;** the Georgia Public Service Commission does not have the authority to declare the statute unconstitutional; the Commission is not free to disregard the statute; the Commission may not select a chairman for a two-year term; and a chairman whose

term commences on July 1, 2009, may serve beyond January 16, 2010, only if there are no other commissioners eligible to serve as chairman under O.C.G.A. § 46-2-5(b)(2). 2009 Op. Att’y Gen. No. 2009-4.

SECTION II.

STATE BOARD OF PARDONS AND PAROLES

Paragraph II. Powers and authority.

JUDICIAL DECISIONS

**Cited** in *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854 (2010).

SECTION III.

STATE PERSONNEL BOARD

Paragraph I. State Personnel Board.

JUDICIAL DECISIONS

**Director was employee not official.** — Summary judgment for community service board on a former executive director’s breach of employment contract claim was reversed because the trial court erred in determining that the director was an official instead of an employee under the State of Georgia Merit Protection System; community service boards constituted

state agencies as local units of the Department of Human Resources, and any state agency expressly had the power to contract on any subject matter within the agency’s interest. *Ashe v. Clayton County Community Serv. Bd.*, 2003 Ga. App. LEXIS 1003 (Aug. 13, 2003) (Unpublished).

ARTICLE V.  
EXECUTIVE BRANCH

**Law reviews.** — For article, “State Government: Organization of the Executive Branch Generally,” see 29 Ga. St. U.L. Rev. 162 (2012).

SECTION II.  
DUTIES AND POWERS OF GOVERNOR

**Law reviews.** — For article, “The Status of Administrative Agencies under the Georgia Constitution,” see 40 Ga. L. Rev. 1109 (2006).

JUDICIAL DECISIONS

**Powers of governor.** — Because, pursuant to Ga. Const. Art. 5, § 2, part of defendant Governor’s job was to ensure the enforcement of Georgia’s statutes, he was properly named as a party in an action challenging the constitutionality of Georgia’s Carry Law, O.C.G.A. § 16-11-127, filed by plaintiff gun owners. GeorgiaCarry.Org, Inc v. Georgia, 687 F.3d 1244 (11th Cir. 2012).

Paragraph III. Commander in chief.

**Law reviews.** — For note, “Rethinking the Role and Regulation of Private Military Companies: What the United States and United Kingdom Can Learn from Shared Experiences in the War on Terror,” see 39 Ga. J. Int’l & Comp. L. 445 (2011).

ARTICLE VI.  
JUDICIAL BRANCH

**Law reviews.** — For article, “See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum,” see 26 Ga. St. U. L. Rev. 361 (2010).

SECTION I.  
JUDICIAL POWER  
Paragraph I. Judicial power of the state.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

**Legislation may not give court’s power to agency.** — Trial court properly ruled that O.C.G.A. § 17-10-6, which authorized the Georgia Sentence Review Panel to review and reduce sentences, was unconstitutional as the Georgia General Assembly does not have the constitutional authority to divest the trial courts of Georgia of their traditional jurisdiction over sentencing by creating a quasi-appellate

tribunal (such as the Panel) to review and alter the otherwise lawful sentences imposed by those trial courts. *Sentence Review Panel v. Moseley*, 284 Ga. 128, 663 S.E.2d 679 (2008).

**Cited in** *Nguyen v. State*, 282 Ga. 483, 651 S.E.2d 681 (2007); *Hendry v. Hendry*, 292 Ga. 1, 734 S.E.2d 46 (2012).

## Paragraph IV. Exercise of judicial power.

### JUDICIAL DECISIONS

#### ANALYSIS

#### GENERAL CONSIDERATION

##### NEW TRIAL

#### General Consideration

**Power to issue injunctions.** — Superior courts are empowered to issue injunctions, Ga. Const. 1983, Art. VI, Sec. I, Para. IV and O.C.G.A. § 15-6-8, and nothing in O.C.G.A. § 48-4-40(1) deprives the superior courts of that power in the arena of redemption of property following a tax sale. *Am. Lien Fund, LLC v. Dixon*, 286 Ga. 562, 690 S.E.2d 415 (2010).

**Probate court.** — Probate court erred by allowing the objections of a bank and a decedent's parents solely on the basis of adverse title and by denying a year's support to the widow when the widow failed to meet the resulting burden of proof, because the probate court lacked the jurisdiction under Ga. Const. 1983, Art. VI, Sec. III, Para. I and O.C.G.A. § 15-9-30 to determine that the relevant money-market account and real property were not part of the estate; despite the jurisdictional limitation and the lack of an appropriate objection, the probate court proceeded to conduct a hearing as to the amount necessary for the widow's support, thereby inappropriately placing upon the widow a burden of proof that was contrary to O.C.G.A. § 53-3-7(a) and otherwise lacking in the absence of the jurisdictionally defective objections to the petition. *In re Mahmoodzadeh*, 314 Ga. App. 383, 724 S.E.2d 797 (2012).

**Dismissal of petition for writs of mandamus and prohibition.** — In an original action brought before the Supreme Court of Georgia, the Court dismissed a petition for writs of mandamus and prohibition filed by a prosecutor re-

garding a criminal prosecution because the prosecutor was not entitled to use the writs to circumvent the statutory limitations on the State's ability to appeal under O.C.G.A. §§ 5-7-1 and 5-7-2. *Howard v. Fuller*, No. S0800357, 2007 Ga. LEXIS 873 (Nov. 30, 2007).

**Contempt finding improper.** — Order holding an attorney in contempt pursuant to O.C.G.A. § 15-11-5 and otherwise was improper because, inter alia, the trial court immediately imposed punishment and did not provide the attorney the opportunity to speak in the attorney's own behalf, the attorney was not put on notice that a continuation of the offending conduct would have constituted contempt, it was highly unlikely that the attorney's allegedly offending conduct should have had any impact on the deliberations of the factfinder, a juvenile judge, and the trial court acted without warning and had obviously lost the court's patience with the attorney and the attorney's client and imposed sanctions for contempt when other actions might have achieved the same result without the disruption to the case that these contempt citations had caused. *In re Hughes*, 299 Ga. App. 66, 681 S.E.2d 745 (2009).

**Dismissal of petition required under O.C.G.A. § 9-10-14.** — Georgia Supreme Court dismissed an inmate's petition for a writ of mandamus because the inmate was not incarcerated in Georgia, thus, the filing requirements of O.C.G.A. § 9-10-14(b) were not applicable to the inmate and the inmate should have filed the petition initially with a Georgia supe-

rior court. *Gay v. Owens*, 292 Ga. 480, 738 S.E.2d 614 (2013).

**Cited in** *Bynum v. State*, 289 Ga. App. 636, 658 S.E.2d 196 (2008); *In re Jefferson*, 283 Ga. 216, 657 S.E.2d 830 (2008); *Clark v. Chapman*, 301 Ga. App. 117, 687 S.E.2d 146 (2009).

**New Trial**

**Municipal courts may hear motions for new trial.** — In a dispossessory ac-

tion, a municipal court erred in holding that it lacked jurisdiction to hear a motion for new trial under O.C.G.A. § 5-5-1. The municipal’s court enacting legislation, 1983 Ga. Laws 4453-4454, § 33, as well as Ga. Const. 1983, Art. VI, Sec. I, Para. IV, gave it such jurisdiction. *Nelson v. Powell*, 293 Ga. App. 227, 666 S.E.2d 598 (2008).

**Paragraph VI. Judicial circuits; courts in each county; court sessions.**

**JUDICIAL DECISIONS**

**ANALYSIS**

**GENERAL CONSIDERATION**

**General Consideration**

**Cited in** *Luangkhot v. State*, 292 Ga. 423, 736 S.E.2d 397 (2013).

**Paragraph VII. Judicial circuits, courts, and judgeships, law changed.**

**JUDICIAL DECISIONS**

**Legislation may not give court’s power to agency.** — Trial court properly ruled that O.C.G.A. § 17-10-6, which authorized the Georgia Sentence Review Panel to review and reduce sentences, was unconstitutional as the Georgia General Assembly does not have the constitutional authority to divest the trial courts of Georgia of their traditional jurisdiction over sentencing by creating a quasi-appellate tribunal (such as the Panel) to review and alter the otherwise lawful sentences imposed by those trial courts. *Sentence Review Panel v. Moseley*, 284 Ga. 128, 663 S.E.2d 679 (2008).

**Power to transfer cases.**

Intermediate appellate court erred in reversing a trial court’s denial of a health care providers’ motion for summary judgment in a wrongful death claim; although the trial court lacked jurisdiction to allow an exception to O.C.G.A. § 51-4-2(a) to authorize a guardian to bring the wrongful death claim, Ga. Const. 1983, Art. VI, Sec. I, Para. VIII required that the trial court’s ruling be vacated and the case remanded with direction to transfer the case to superior court. *Blackmon v. Tenet Healthsystem Spalding, Inc.*, 284 Ga. 369, 667 S.E.2d 348 (2008).

**Paragraph VIII. Transfer of cases.**

**JUDICIAL DECISIONS**

**Cited in** *Ford v. Hanna*, 292 Ga. 500, 739 S.E.2d 309 (2013).

SECTION II.

VENUE

**Law reviews.** — For note, “Getting Personal With Our Neighbors—A Survey of Southern States’ Exercise of General Jurisdiction and A Proposal for Extending Georgia’s Long-Arm Statute,” see 25 Ga. St. U. L. Rev. 1177 (2009).

Paragraph I. Divorce cases.

JUDICIAL DECISIONS

ANALYSIS

REQUIREMENTS OF DIVORCE ACTIONS

1. VENUE GENERALLY

Requirements of Divorce Actions

1. Venue Generally

**Proper venue.** — Contrary to the wife’s claim, venue was proper in Houston County because the record showed that

the wife gave the marital address as the wife’s place of residence and the residence was located in Houston County. *Rymuza v. Rymuza*, 292 Ga. 98, 734 S.E.2d 384 (2012).

Paragraph III. Equity cases.

JUDICIAL DECISIONS

ANALYSIS

PROPER VENUE

JURISDICTION

2. JURISDICTION SATISFIED

4. LACK OF JURISDICTION

Proper Venue

Venue of equity actions.

Assuming that O.C.G.A. § 53-7-54(b) created a cause of action against third-parties, as the trust created by the statute was a creature of equity jurisdiction, under Ga. Const. 1983, Art. VI, Sec. II, Para. III, venue for such actions was in the county where a defendant resided. Thus, where a contempt petition was filed pursuant to the statute, the motion to transfer venue filed by two lawyers and their law firm should have been granted as neither lawyer resided in the forum county and their law firm was not located in that county. *Rader v. Levenson*, 290 Ga. App. 227, 659 S.E.2d 655 (2008).

Jurisdiction

2. Jurisdiction Satisfied

**Venue in licensing actions against state board.** — Venue of contractors’ action seeking to restrain the Georgia State Licensing Board for Residential and General Contractors and a county from enforcing a licensing law, O.C.G.A. § 43-41-1 et seq., was proper in Muscogee County because there was substantial equitable relief sought that was common to the Board and to the resident county; the complaint alleged that enforcement of the licensing law by both the Board and the county would cause irreparable injury to the contractors, and it asked that preliminary and permanent injunctions be issued

against both the county and the Board enjoining and restraining them from exercising any of the powers, rights, or duties respecting enforcement of the licensing law. *Ga. State Licensing Bd. for Residential & Gen. Contrs. v. Allen*, 286 Ga. 811, 692 S.E.2d 343 (2010).

4. Lack of Jurisdiction

**Dismissal proper in dispute over insurance policy.** — Columbia County Superior Court did not have personal ju-

risdiction over an insurance policy beneficiary who resided in another county sufficient to impose equitable relief against the beneficiary, pursuant to *Ga. Const. 1983, Art. VI, Sec. II, Para. III*. Joinder of the beneficiary was not proper even if jurisdiction was proper as to the insurer under *O.C.G.A. § 33-4-1(4)* because the complaint did not seek equitable relief common to both the non-resident beneficiary and the insurer. *Skaliy v. Metts*, 287 Ga. 777, 700 S.E.2d 357 (2010).

Paragraph IV. Suits against joint obligors, copartners, or joint trespassers.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

VENUE

2. JOINT TORTFEASORS

General Consideration

**Jurisdiction and venue distinguished.**

In a borrower's suit asserting various claims against a lender, which was a citizen of Delaware and California, and an appraiser in connection with a loan that encumbered the borrower's property with a debt that exceeded the property's value, jurisdiction under 28 U.S.C. § 1332 did not exist where the borrower and the appraiser were both citizens of Georgia; the fact that the borrower may have filed the suit in an inappropriate venue under *Ga. Const. 1983, Art. VI, Sec. II, Para. IV* did not render the appraiser's joinder fraudulent under the doctrine of fraudulent pleading because such a pleading of jurisdictional facts did not destroy diversity, as the appraiser was still a resident of Georgia. *Austin v. Ameriquist Mortg. Co.*, 510 F. Supp. 2d 1218 (N.D. Ga. Feb. 27, 2007).

**Cited in** *HD Supply, Inc. v. Garger*, 299 Ga. App. 751, 683 S.E.2d 671 (2009).

Venue

2. Joint Tortfeasors

**Venue in county of codefendant's residence permissible.**

An ex-spouse filed a tort action against the defendants in a county where two of them did not reside. As one defendant admitted that venue was proper as to that defendant, venue was proper as to the other defendants as well. *Walker v. Walker*, 293 Ga. App. 872, 668 S.E.2d 330 (2008).

**Constitutional joint tortfeasor venue provision did not apply.** —

In a mortgage broker's breach of contract action against a limited liability company, the trial court erred in denying a motion to transfer to a proper venue filed by the mortgage broker president, who was added as a defendant, because the constitutional joint tortfeasor venue provision, *Ga. Const. 1983, Art. VI, Sec. II, Para. IV*, did not apply to subject the president to trial with the broker on the LLC's counterclaim in Coweta County since the bro-

ker did not reside in Coweta County; as an individual resident of DeKalb County, the president was entitled under the constitutional venue provisions to be sued in

DeKalb County, Ga. Const. 1983, Art. VI, Sec. II, Para. VI. *M&M Mortg. Co. v. Grantville Mill, LLC*, 302 Ga. App. 46, 690 S.E.2d 630 (2010).

## Paragraph VI. All other cases.

**Law reviews.** — For comment, “Inappropriate Forum or Inappropriate Law? A Choice of Law Solution to the Jurisdic-

tional Standoff Between the United States and Latin America,” see 60 *Emory L.J.* 1437 (2011).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### DETERMINING VENUE

2. CIVIL ACTIONS
3. CRIMINAL ACTIONS
4. CORPORATIONS GENERALLY

### General Consideration

**O.C.G.A. § 16-9-121 is constitutional.** — O.C.G.A. § 16-9-125 complies with Ga. Const. 1983, Art. VI, Sec. II, Para. VI; since the crime of identity fraud, as defined by O.C.G.A. §§ 16-9-121 and 16-9-125, when read in para materia, takes place in the county where the victim and his or her personal information are located, there is no constitutional bar to trying the defendant in that county. *State v. Mayze*, 280 Ga. 5, 622 S.E.2d 836 (2005).

**O.C.G.A. § 16-9-121 is unconstitutional insofar as it allows jurisdiction in the county in which the victim resides in all cases.** — *State v. Mayze*, which is cited in the casenote under this catchline in the bound volume, has been vacated, with different results reached on reconsideration by *State v. Mayze*, 280 Ga. 5, 622 S.E.2d 836 (2005).

**Jurisdiction and venue distinguished.**

In a borrower’s suit asserting various claims against a lender, which was a citizen of Delaware and California, and an appraiser in connection with a loan that encumbered the borrower’s property with a debt that exceeded the property’s value, jurisdiction under 28 U.S.C. § 1332 did not exist where the borrower and the appraiser were both citizens of Georgia; the fact that the borrower may have filed

the suit in an inappropriate venue under Ga. Const. 1983, Art. VI, Sec. II, Para. VI did not render the appraiser’s joinder fraudulent under the doctrine of fraudulent pleading because such a pleading of jurisdictional facts did not destroy diversity, as the appraiser was still a resident of Georgia. *Austin v. Ameriquest Mortg. Co.*, 510 F. Supp. 2d 1218 (N.D. Ga. Feb. 27, 2007).

**Cited in** *Honeycutt v. Honeycutt*, 284 Ga. 42, 663 S.E.2d 232 (2008).

### Determining Venue

#### 2. Civil Actions

**Venue is in county where defendant resides.**

In a mortgage broker’s breach of contract action against a limited liability company, the trial court erred in denying a motion to transfer to a proper venue filed by the mortgage broker president, who was added as a defendant, because the constitutional joint tortfeasor venue provision, Ga. Const. 1983, Art. VI, Sec. II, Para. IV, did not apply to subject the president to trial with the broker on the LLC’s counterclaim in Coweta County since the broker did not reside in Coweta County; as an individual resident of DeKalb County, the president was entitled under the constitutional venue provisions to be sued in DeKalb County, Ga.

Const. 1983, Art. VI, Sec. II, Para. VI. *M&M Mortg. Co. v. Grantville Mill, LLC*, 302 Ga. App. 46, 690 S.E.2d 630 (2010).

Trial court did not err in granting a landowner summary judgment in a church's quiet title action because the doctrine of collateral estoppel applied when prior action adjudicated that the director of the church did not have the authority to act on behalf of or to represent the church, but the director did so by directing the filing of the quiet title action; the previous litigation was decided by a court of competent jurisdiction because the case was filed in the superior court in the county of the director's residence, and that court could adjudicate whether the director had the authority to act on behalf of or to represent the church corporation. *Body of Christ Overcoming Church of God, Inc. v. Brinson*, 287 Ga. 485, 696 S.E.2d 667 (2010).

Trial court erred in finding that venue was proper in Effingham County, Georgia because the defendant, who maintained residences in both Effingham County and Chatham County, Georgia, was domiciled in Chatham County. *Oglesby v. Deal*, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

**Auto negligence case, neither party Georgia resident, but defendant served in Georgia.** — In an auto negligence suit, a trial court properly found that venue was proper in Muscogee County, Georgia, though the accident occurred in Alabama and both parties were Alabama residents, because the defendant was found and served in Muscogee County. *Gowdy v. Schley*, 317 Ga. App. 693, 732 S.E.2d 774 (2012).

**Trial court erred in granting transfer motion.** — In a wrongful death medical malpractice suit, the trial court erred in granting the plaintiff's motion to transfer venue of the case because the remaining defendant had waived the defendant's venue defenses and, therefore, the plaintiff had no standing to require the trial court to transfer the case to the county where the defendant resided when suit was filed. *Richardson v. Gilbert*, 319 Ga. App. 72, 733 S.E.2d 783 (2012).

### 3. Criminal Actions

**Venue of the crime must be established clearly and beyond a reasonable doubt.**

Because the state failed to prove the element of venue beyond a reasonable doubt, and there was no indication in the record that the juvenile waived said requirement or that the court took judicial notice of venue as an element of the offenses charged, the juvenile's adjudications of delinquency had to be reversed. In *the Interest of J.B.*, 289 Ga. App. 617, 658 S.E.2d 194 (2008).

**State not required to stipulate to venue.** — Venue is not a fact to which the state is required to stipulate whenever the defendant wishes to do so, particularly when the state disbelieves the defendant's account of that fact, because stipulations and waivers of jurisdictional defenses streamline a proceeding in which both parties agree on a fact, making further proof unnecessary; stipulations and jurisdictional waivers are not a means of forcing an opposing party to agree to facts it believes are not true and would mislead the factfinder. If the facts are disputed, the parties' competing evidence and arguments can be presented to the factfinder to resolve. *State v. Dixon*, 286 Ga. 706, 691 S.E.2d 207 (2010).

#### **Proof of venue.**

The incident on which a sodomy charge was based occurred about one mile from the home in Gordon County where the defendant and the victim lived, when the defendant and the victim were driving home; thus, under O.C.G.A. § 17-2-2(e), the crime was considered to have occurred in Gordon County, through which the car traveled, and the state proved venue. *Prudhomme v. State*, 285 Ga. App. 662, 647 S.E.2d 343 (2007).

In a juvenile delinquency case, the state had failed to prove venue where it offered no evidence that a church where an aggravated assault occurred was within the boundaries of the county in question; as to charges of obstruction of an officer, there was no evidence as to the location of the

houses where the acts in question occurred. In the Interest of D.D., 287 Ga. App. 512, 651 S.E.2d 817 (2007).

In a prosecution for aggravated child molestation and sodomy, a child's testimony that the defendant sodomized the child at the child's home on three occasions was sufficient to prove that venue was in the county where that home was located. *Terry v. State*, 293 Ga. App. 455, 667 S.E.2d 109 (2008).

While there was sufficient evidence that the defendant obstructed an officer in making an arrest, as there was no evidence that the city and street where the arrest and the obstruction occurred were in Floyd County, the state failed to prove venue, which was an essential element of the obstruction charge. *Frasier v. State*, 295 Ga. App. 596, 672 S.E.2d 668 (2009).

State's failure to prove beyond a reasonable doubt that the defendant and the codefendant possessed a pipe with traces of methamphetamine on it, which was discovered in a search of the defendant's impounded vehicle in the county, rendered the verdict contrary to law, without a sufficient evidentiary basis, because venue was an essential element of the crime, and there was no direct evidence of possession of the pipe in the county; because there was no evidence placing the pipe in the vehicle while the vehicle was in the county, and there was a possibility that the pipe was put in the vehicle after the shootings during one of several stops the defendant and the codefendant made while in Alabama, venue for possession of methamphetamine was not proven to be in the county. *Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009).

Venue with regard to convictions for possession of methamphetamine and of the less than an ounce of marijuana was established as being in the county where the drugs were discovered during a search of the defendant's impounded vehicle because although the state presented no evidence that the methamphetamine residue and the marijuana found in the vehicle were in the possession of the defendant and the codefendant while they were in the county. On cross-examination, the defendant admitted to having hand-rolled a marijuana cigarette found in the vehicle

the morning of the shooting; that testimony, coupled with the undisputed fact that the defendant, the codefendant, and the vehicle were at a service station in the county at a time following the point at which the defendant admitted having made the cigarette, established beyond a reasonable doubt that the defendant and codefendant possessed the marijuana cigarette in the county. *Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009).

State failed to prove venue beyond a reasonable doubt because evidence that the defendant's drugs sales to an informant occurred somewhere in Vidalia, Georgia, was insufficient to establish that the crimes occurred in Toombs County since the habeas court properly took judicial notice that Vidalia was located in two different counties, Toombs and Montgomery; there was no evidence that the drug task force agents were limited to acting within Toombs County, and even if the agents' authority was limited to Toombs County, the agents did not exercise any police power during the time in which the drug sales were made that was required to be limited to the agents' territorial jurisdiction, but instead, the agents were simply watching the informant and the defendant as the agents drove, and in doing so, the agents would have been authorized to follow the defendant across county lines. *Thompson v. Brown*, 288 Ga. 855, 708 S.E.2d 270 (2011).

Trial court did not err in denying the defendant's motion for new trial after the defendant was convicted of rape because venue was sufficiently established by a detective's testimony that the apartment complex where the crimes occurred was in DeKalb County, and even accepting the defendant's argument that the evidence only supported the conclusion that the victim could have been driven into another county before the rape occurred, that would not preclude a jury's conclusion that venue could be proper in DeKalb County; because the most definite testimony regarding the location of the crimes related to DeKalb County, the jury was authorized to find beyond a reasonable doubt that the rape could have occurred there. *Bizimana v. State*, 311 Ga. App. 447, 715 S.E.2d 754 (2011).

Evidence was sufficient to support codefendant's conviction on 12 counts of identity fraud, in violation of O.C.G.A. § 16-9-121(a)(1), based on the state introducing evidence that the victims' identifying information was found in the Henry County, Georgia, residence of defendant, and 12 of the victims testified at trial that they did not authorize any such use of their identifying information, and codefendant admitted in her statement that she was a party to the crime in that she provided the victims' identifying information to an unauthorized third party, thus, the evidence was sufficient to allow the jury to find that at least part of the identity fraud took place in Henry County, regardless of whether codefendant was ever actually in that county. *Manhertz v. State*, 317 Ga. App. 856, 734 S.E.2d 406 (2012).

**Venue in violation of state ethics law.** — When the defendants were indicted under O.C.G.A. § 21-5-9 for failing to file documents with the state ethics commission under O.C.G.A. § 21-5-34, venue was in the county where the commission was exclusively located; the place fixed for performance of the required act fixed the situs of the alleged crime. *McKinney v. State*, 282 Ga. 230, 647 S.E.2d 44 (2007).

**Identity fraud.**

State established venue under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. §§ 16-9-125 and 17-2-2(a) because a reasonable trier of fact was authorized to find beyond a reasonable doubt that the victims resided or were found in Forsyth County at the time the offense of financial identity fraud was committed as alleged in the indictment; the victim testified that the victim had been a resident of Forsyth County for twelve years and that the victim's company had been located there for seventeen years. *Zachery v. State*, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

**DUI cases.**

After a defendant was granted a directed verdict on the basis that the state failed to prove venue in a criminal prosecution for driving under the influence *per se*, retrial was not barred under U.S. Const., amend. V and O.C.G.A. § 16-1-8

because, while venue had to be laid in the county in which the crime was allegedly committed under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2 and venue was a jurisdictional fact, failure to prove venue was a procedural error that implied nothing as to defendant's guilt or innocence. *Hudson v. State*, 296 Ga. App. 758, 675 S.E.2d 603, cert. denied, No. S09C1163, 2009 Ga. LEXIS 413 (Ga. 2009); cert. denied, 558 U.S. 1076, 130 S. Ct. 799, 175 L. Ed. 2d 559 (2009).

**Adequate evidence of proper venue.**

In a child molestation case, venue in McIntosh County was proper; the victim testified that the crime occurred in the home of the victim's aunt, where the victim currently lived, and the aunt testified that she currently lived in McIntosh County. *Flanders v. State*, 285 Ga. App. 805, 648 S.E.2d 97 (2007).

With regard to a defendant's conviction for child molestation, the victim's testimony that the victim lived in a particular city, which was located in Spalding County, and that the incident occurred at another apartment, which the evidence revealed through the testimony was also located in that particular city, there was sufficient evidence to prove venue in Spalding County beyond a reasonable doubt. *Mahone v. State*, 293 Ga. App. 790, 668 S.E.2d 303 (2008).

Although defendant argued that the state failed to prove venue beyond a reasonable doubt, pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a) generally, a criminal case had to be tried in the county in which the crime was committed. The state had the burden of proving venue, which the state could do using either direct or circumstantial evidence, and whether the evidence as to venue satisfied the reasonable-doubt standard was a question for the jury, and the court's decision will not be set aside if there is any evidence to support the decision; therefore, because in defendant's case, the victim testified that defendant molested the victim in their residence and that the residence was located in Grady County, Georgia, venue was established beyond a reasonable doubt. *Bynum v. State*, 300 Ga. App. 163,

684 S.E.2d 330 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. 2010).

Evidence that a police officer found the victim lying on a sidewalk in Fulton County was sufficient to establish venue in that county under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a). *Branford v. State*, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

Trial court did not err in denying the defendant's motion to dismiss an indictment charging the defendant with arranging to buy cattle and failing or refusing to pay the seller in violation of O.C.G.A. § 16-9-58 on the ground that venue did not lie in Laurens County because there was some evidence that the place of payment was at the seller's location in Laurens County and that the defendant wrongfully failed or refused to pay the seller in Laurens County for the cattle; even if the defendant's fraudulent intent arose in Kansas sometime after the cattle were shipped, the crime was not consummated until the defendant failed or refused to pay. *Babbitt v. State*, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

**Venue properly set forth in indictment.** — Contrary to defendant's contention, the indictment against him was not fatally flawed as it stated the venue of the crimes by indicating that it was returned in the Superior Court of Elbert County, Georgia, and that each count charged was committed by him in the county and state aforesaid. *Leverette v. State*, 291 Ga. 834, 732 S.E.2d 255 (2012).

**Trial court not required to instruct jury on lesser included offense over which court lacks venue.** — Court of appeals erred in reversing the defendant's conviction for armed robbery because the trial court properly declined to instruct the jury on the lesser included offense of

theft by taking since there was no evidence that the included crime was committed in the county in which the defendant was being tried; although the state was unwilling to allow the defendant to waive venue or stipulate that what occurred was a theft by taking that happened entirely in Clayton County, the defendant was free to present evidence and argue to the jury that while the defendant was guilty of committing theft by taking in Clayton County, the defendant was not guilty of armed robbery in DeKalb County. But the defendant could not require the state to agree that the defendant committed theft by taking in Clayton County or require the trial court to instruct the jury on a lesser included offense over which the court lacked venue. *State v. Dixon*, 286 Ga. 706, 691 S.E.2d 207 (2010).

#### 4. Corporations Generally

**Proper venue had to be determined pursuant to Georgia's long arm statute.** — Trial court did not err in denying a motion filed by a corporate president and the president's spouse to dismiss a corporation's action against them or, in the alternative, to transfer the case because the trial court's application of the relation-back statute, O.C.G.A. § 9-11-15(c), did not violate the constitutional right of the president and the wife to be sued in the county where they resided under Ga. Const. 1983, Art. VI, Sec. II, Para. VI; because the president and the spouse were not residents of Georgia when the suit was filed, the proper venue had to be determined pursuant to Georgia's Long Arm Statute, O.C.G.A. §§ 9-10-91 and 9-10-93. *Cartwright v. Fuji Photo Film U.S.A., Inc.*, 312 Ga. App. 890, 720 S.E.2d 200 (2011), cert. denied, No. S12C0600, 2012 Ga. LEXIS 306 (Ga. 2012).

SECTION III.

CLASSES OF COURTS OF LIMITED JURISDICTION

Paragraph I. Jurisdiction of classes of courts of limited jurisdiction.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
PROBATE COURTS

General Consideration

**Termination of parental rights.** — Pursuant to O.C.G.A. § 15-11-28(a)(2)(C), the superior court did not have subject matter jurisdiction to terminate the husband’s parental rights because the biological father’s petition to legitimate a child who was born in wedlock was a petition to terminate the parental rights of the legal father; after the superior court determined that the biological father had not abandoned his opportunity interest, the issue became whether the superior court could grant the petition to legitimate the child, and to grant the legitimation petition required the superior court to first terminate the parental rights of the husband, who was the legal father. *Brine v. Shipp*, 291 Ga. 376, 729 S.E.2d 393 (2012).

Probate Courts

**No jurisdiction to try title claims on application for year’s support.**

Probate court erred by allowing the objections of a bank and a decedent’s parents solely on the basis of adverse title and by denying a year’s support to the widow when the widow failed to meet the resulting burden of proof because the probate court lacked the jurisdiction under Ga. Const. 1983, Art. 6, Sec. 3, Para. I and O.C.G.A. § 15-9-30 to determine that the relevant money-market account and real property were not part of the estate; despite the jurisdictional limitation and the lack of an appropriate objection, the probate court proceeded to conduct a hearing as to the amount necessary for the widow’s support, thereby inappropriately placing upon the widow a burden of proof that was contrary to O.C.G.A. § 53-3-7(a) and otherwise lacking in the absence of the jurisdictionally defective objections to the petition. *In re Mahmoodzadeh*, 314 Ga. App. 383, 724 S.E.2d 797 (2012).

SECTION IV.

SUPERIOR COURTS

Paragraph I. Jurisdiction of superior courts.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
TITLE TO LAND  
JURISDICTION GENERALLY  
APPELLATE JURISDICTION

### General Consideration

**Section 9-10-31.1(a) is constitutional.** — O.C.G.A. § 9-10-31.1(a) does not automatically divest a superior court of its jurisdiction, but to the contrary a transfer of venue under the statute occurs only after the trial court exercises initial jurisdiction over the case to determine whether, in the interest of justice and for the convenience of the parties and witnesses, a claim or action would be more properly heard in a forum outside the state; accordingly, § 9-10-31.1(a) remains constitutional under Ga. Const. 1983, Art. VI, Sec. IV, Para. I. *Hawthorn Suites Golf Resorts, LLC v. Feneck*, 282 Ga. 554, 651 S.E.2d 664 (2007).

**Cited in** *Bonner v. State*, 302 Ga. App. 57, 690 S.E.2d 216 (2010).

### Title to Land

**Jurisdiction held proper.** — Upon finding that the trial court had exclusive subject matter jurisdiction, the court also properly ruled that a sibling had prescriptive title to certain property under O.C.G.A. § 44-5-164 by possessing the property under color of title for a period greater than seven years, satisfying the requirements of O.C.G.A. § 44-5-161; the fraud alleged by the other siblings did not defeat said title, as they were unaware of the fraud from 1989 to 2002. *Goodrum v. Goodrum*, 283 Ga. 163, 657 S.E.2d 192 (2008).

### Jurisdiction Generally

**Subject matter jurisdiction over business dispute.** — In a direct action brought by a shareholder against another, the trial court did not err by vacating a consent order that incorporated a settlement agreement allegedly reached by the parties as the trial judge to whom the case had been reassigned had subject matter jurisdiction to vacate the previously entered order when the trial judge heard the contempt motions since the trial judge had subject matter jurisdiction over the action, which involved a business dispute. Further, since no final order had been entered in the matter and the case remained pending, the trial court had au-

thority to reconsider the ruling made on the consent order, vacate the order, and order that the matter proceed to trial, irrespective of whether the case has been reassigned to a different trial judge. *Internal Med. Alliance, LLC v. Budell*, 290 Ga. App. 231, 659 S.E.2d 668 (2008).

**Subject matter jurisdiction over action seeking injunction on dockage issues.** — Trial court had subject matter jurisdiction over a landowner's action seeking an interlocutory injunction requiring neighbors to move the neighbors' dock because the neighbors did not point to any federal law that would preempt the trial court as an appropriate forum for adjudicating the rights and remedies of the parties; there was no Congressional intent to preclude state action concurrently with the statutory and regulatory scheme establishing the authority of the Army Corps of Engineers over docks on the lake where the parties lived. *Dillon v. Reid*, 312 Ga. App. 34, 717 S.E.2d 542 (2011).

**Termination of parental rights.** — Pursuant to O.C.G.A. § 15-11-28(a)(2)(C), the superior court did not have subject matter jurisdiction to terminate the husband's parental rights because the biological father's petition to legitimate a child who was born in wedlock was a petition to terminate the parental rights of the legal father; after the superior court determined that the biological father had not abandoned his opportunity interest, the issue became whether the superior court could grant the petition to legitimate the child, and to grant the legitimation petition required the superior court to first terminate the parental rights of the husband, who was the legal father. *Brine v. Shipp*, 291 Ga. 376, 729 S.E.2d 393 (2012).

**Custody dispute of orphaned children.** — In a custody dispute involving children orphaned by the murder-suicide of their parents, a trial court did not err in denying an aunt's motion to dismiss for lack of jurisdiction because the trial court correctly held that, in the absence of an earlier-filed action in juvenile court or probate court, it was the first court to take jurisdiction and it properly retained it. *Stone-Crosby v. Mickens-Cook*, 318 Ga. App. 313, 733 S.E.2d 842 (2012).

## Appellate Jurisdiction

### Jurisdiction in workers' compensation appeals.

Appellate Division of the State Board of Workers' Compensation had the authority to award a life estate to an employer because no dispute as to the title of land was foreseeable in the future, and the Board did not exercise authority reserved to the superior court alone, but rather, it simply exercised its broad authority to craft a reasonable remedy; the Board's Rehabilitation Guidelines require that all issues of ownership and maintenance be resolved before any construction begins. *S. Concrete/Watkins Associated Indus. v. Spires*, No. A10A1981, 2011 Ga. App. LEXIS 243 (Mar. 22, 2011).

**Judicial review of local government's zoning appeal board.** — Prop-

erty owner properly filed a writ of mandamus challenging a county's denial of a business license because the county had no ordinance directing an alternative method of judicial review from a decision by the zoning appeal board, and Ga. Const. 1983, Art. VI, Sec. IV, Para. I did not provide a form of appeal. *Haralson County v. Taylor Junkyard of Bremen, Inc.*, 291 Ga. 321, 729 S.E.2d 357 (2012).

**Judicial review of disability determination.** — Superior court lacked jurisdiction for direct appellate review of the denial of a state employee's application for retirement disability benefits under O.C.G.A. § 47-2-123(b)(1). O.C.G.A. § 47-2-3 was inapplicable because the employee was not discharged from employment. *Employees' Ret. Sys. of Ga. v. Harris*, 303 Ga. App. 191, 692 S.E.2d 798 (2010).

## SECTION V.

### COURT OF APPEALS

### Paragraph III. Jurisdiction of Court of Appeals; decisions binding.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### CORRECTION OF ERRORS OF FACT

#### CRIMINAL CASES AND CONTEMPT OF COURT

#### OTHER CASES

#### PLEADING AND PRACTICE

#### 1. IN GENERAL

### General Consideration

**Court of Appeals lacked jurisdiction to construe constitutional provision.** — In reversing a trial court's denial of a motion for summary judgment, the Georgia Court of Appeals exceeded its jurisdiction by construing a constitutional provision that had not previously been construed by the Georgia Supreme Court and then applying the newly construed provision to the facts of the case. *City of Decatur v. DeKalb County*, 284 Ga. 434, 668 S.E.2d 247 (2008).

Court lacked jurisdiction to adjudicate a

debtor's claim of state court judicial misconduct after the stay was lifted to permit a state court suit involving the debtor to proceed because nothing in 28 U.S.C. § 157 granted the court appellate power over, or disciplinary power, or oversight responsibility of the state court. Proper forum for the claim was the state appellate court pursuant to Ga. Const. 1983, Art. VI, Sec. V, Para. III. *In re Osborne*, No. 00-40453, 2001 Bankr. LEXIS 2314 (Bankr. S.D. Ga. Mar. 14, 2001).

**Cited in** *Cook v. Board of Registrars*, 291 Ga. 67, 727 S.E.2d 478 (2012).

### Correction of Errors of Fact

#### Jurisdiction over cross-appeal. —

Although under O.C.G.A. § 5-6-48(e), a cross-appeal may survive the dismissal of the main appeal, that is true only if the cross-appeal can stand on its own merit, and the Court of Appeals of Georgia has no jurisdiction to entertain a cross-appeal which must derive its life from the main appeal. An appellant's voluntary withdrawal of its direct appeal requires the dismissal of a cross-appeal that has no independent basis for jurisdiction and, to the extent it holds otherwise, *MARTA v. Harrington, George & Dunn, P.C.*, 208 Ga. App. 736 (1993) is overruled. *State, DOT v. Douglas Asphalt Co.*, 297 Ga. App. 511, 677 S.E.2d 728 (2009).

### Criminal Cases and Contempt of Court

#### Cruel and unusual punishment claim waived on appeal. —

Defendant's appeal of an order denying the defendant's motion for new trial was transferred to the court of appeals because the claim that the defendant's sentence under O.C.G.A. § 16-5-40(d)(4) for kidnapping with bodily injury violated the cruel and unusual punishments clause of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. I, Para. XVII, did not invoke the supreme court's constitutional question jurisdiction under Ga. Const. 1983, Art. VI, Sec. VI, Para. II(1); because the cruel and unusual punishment claim was not timely raised in the trial court, review of the claim's merits was waived on appeal. *Brinkley v. State*, 291 Ga. 195, 728 S.E.2d 598 (2012).

### Other Cases

**Appellate jurisdiction to review grant of summary judgment. —** Court of appeals had appellate jurisdiction to review the grant of summary judgment in favor of a bank on the bank's conversion claim against a real estate firm because the grant of summary judgment was directly appealable under O.C.G.A.

§ 9-11-56(h), and the firm's cross-appeal of that grant of summary judgment could stand on its own merits; because the court of appeals had jurisdiction to review the grant of summary judgment in favor of the bank on the bank's conversion claim, the court also had jurisdiction pursuant to O.C.G.A. § 5-6-34(d) to review the denial of the firm's motion for summary judgment on that same issue. *Trey Inman & Assocs., P.C. v. Bank of Am., N.A.*, 306 Ga. App. 451, 702 S.E.2d 711 (2010).

### Pleading and Practice

#### Appeal from non-final judgment was dismissed. —

Georgia Court of Appeals did not have jurisdiction over an appeal from a decision of a superior court remanding a case involving a challenge to a permit to build a community dock issued under the Coastal Marshlands Protection Act, O.C.G.A. § 12-5-286(a), to an administrative law judge for further consideration. The order was not final as required under O.C.G.A. § 50-13-20. *Coastal Marshlands Prot. Comm. v. Altamaha Riverkeeper, Inc.*, 304 Ga. App. 1, 695 S.E.2d 273, cert. denied, No. S10C1494, 2010 Ga. LEXIS 745 (Ga. 2010).

### 1. In General

#### Failure to file brief and enumerations of error. —

Georgia Department of Transportation's (DOT's) cross-appeal was dismissed with regard to a trial court's grant of an asphalt company's motions in limine and the denial of the DOT's partial motion for summary judgment since the asphalt company's direct appeal was dismissed for failure to file a brief and enumerations of error, therefore, the cross-appeal could not survive on its own under O.C.G.A. § 5-6-48. The DOT never applied for interlocutory review of the rulings of the trial court it was challenging, therefore, the appellate court had no independent basis for jurisdiction over the cross-appeal. *State, DOT v. Douglas Asphalt Co.*, 297 Ga. App. 511, 677 S.E.2d 728 (2009).

SECTION VI.  
SUPREME COURT

**Paragraph I. Composition of Supreme Court; Chief Justice; Presiding Justice; quorum; substitute judges.**

**Law reviews.** — For article, “The Majority That Wasn’t: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements,” see 58 Emory L.J. 831 (2009).

**Paragraph II. Exclusive appellate jurisdiction of Supreme Court.**

JUDICIAL DECISIONS

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GENERAL CONSIDERATION

**General Consideration**

**Exclusive jurisdiction where constitutionality of law or ordinance in question.**

In reversing a trial court’s denial of a motion for summary judgment, the Georgia Court of Appeals exceeded its jurisdiction by construing a constitutional provision that had not previously been construed by the Georgia Supreme Court and then applying the newly construed provision to the facts of the case. *City of Decatur v. DeKalb County*, 284 Ga. 434, 668 S.E.2d 247 (2008).

A distinct, oral ruling, reflected in a transcript is sufficient and need not be reduced to writing in order to invoke the Supreme Court of Georgia’s exclusive appellate jurisdiction in cases in which the constitutionality of a law has been drawn into question. *Jenkins v. State*, 284 Ga. 642, 670 S.E.2d 425 (2008).

**Constitutional challenges considered.** — Trial court erred in determining that a defendant’s challenges to the constitutionality of O.C.G.A. § 17-10-10 were waived; however, the Supreme Court of Georgia had jurisdiction to consider the constitutional challenges under Ga. Const. 1983, Art. VI, § VI, Para. II, because the trial court also made a distinct ruling in the alternative rejecting the challenges on the merits. *Rooney v. State*,

287 Ga. 1, 690 S.E.2d 804, cert. denied, 131 S. Ct. 117, 178 L. Ed. 2d 72 (2010).

**Waiver of constitutional challenge.**

— While a defendant challenged the constitutionality of the non-merger provision of the hijacking a motor vehicle statute, O.C.G.A. § 16-5-44.1(d), the state supreme court, where the initial appeal had been filed under Ga. Const. 1983, Art. VI, Sec. VI, Para. II, had determined that the challenge was untimely and thus had been waived; thus, the defendant could not pursue the challenge at the appellate court level after the case had been transferred. *Rutland v. State*, 296 Ga. App. 471, 675 S.E.2d 506 (2009).

Defendant’s appeal of an order denying the defendant’s motion for new trial was transferred to the court of appeals because the claim that the defendant’s sentence under O.C.G.A. § 16-5-40(d)(4) for kidnapping with bodily injury violated the cruel and unusual punishments clause of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. I, Para. XVII, did not invoke the supreme court’s constitutional question jurisdiction under Ga. Const. 1983, Art. VI, Sec. VI, Para. II(1); because the cruel and unusual punishment claim was not timely raised in the trial court, review of the claim’s merits was waived on appeal. *Brinkley v. State*, 291 Ga. 195, 728 S.E.2d 598 (2012).

**Election contest must tie to specific election.** — Without a clear connection to

a specific election, a challenge to a voter’s qualifications brought under O.C.G.A. § 21-2-228 or O.C.G.A. § 21-2-229 does not come within the jurisdiction of the Supreme Court of Georgia over “cases of election contest,” Ga. Const. 1983, Art. VI, Sec. VI, Para. II(2). To the extent that *Jarrard v. Clayton County Bd. of Registrars*, 425 S.E.2d 874 (1992), was decided as an election contest, it was overruled. *Cook v. Board of Registrars*, 291 Ga. 67, 727 S.E.2d 478 (2012).

**Constitutional challenge to wiretap statute not preserved for appellate review.** — Defendants’ constitutional challenge to the interpretation of Georgia wiretap statute, O.C.G.A. § 16-11-64, was

not preserved for appellate review because the record failed to show that the trial court directly ruled upon the question of whether enforcement of wiretap warrants, extensions, and amendments violated the defendants’ privacy rights; the supreme court’s exclusive appellate jurisdiction of constitutional issues under Ga. Const. 1983, Art. VI, Sec. VI, Para. II was not invoked and the appeal properly was filed in the court of appeals. *Luangkhot v. State*, 313 Ga. App. 599, 722 S.E.2d 193 (2012).

**Cited in** *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008); *Wheatley v. Moe’s Southwest Grill, LLC*, 580 F. Supp. 2d 1324 (N.D. Ga. 2008).

Paragraph III. General appellate jurisdiction of Supreme Court.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TITLE TO LAND

1. IN GENERAL

EQUITY

1. IN GENERAL

8. SPECIFIC CASES

DIVORCE AND ALIMONY

OTHER CASES

General Consideration

**Interpretation of legal document.** — Appeals filed by a trustee and a beneficiary were transferred from the supreme court to the court of appeals because the cases did not come within the supreme court’s appellate jurisdiction over “equity cases” under Ga. Const. 1983, Art. VI, Sec. VI, Para. III; the issue presented on appeal, how to interpret a specific provision of a legal document, was a straightforward legal question. *Durham v. Durham*, 291 Ga. 231, 728 S.E.2d 627 (2012).

**Cited in** *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634 (2011).

**Court’s jurisdiction.** — Appeal by the trustees of a local church of a judgment determining that the possessory interest in property held by the local church was held in trust for the benefit of a national church and ordering that property delivered to the national church was within the supreme court’s appellate jurisdiction over all equity cases under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2); because resolution of the equitable issue would not be a matter of routine once the underlying legal issues were resolved, a substantive issue on appeal involved the legality or propriety of equitable relief. *Kemp v. Neal*, 288 Ga. 324, 704 S.E.2d 175 (2010).

Equity

1. In General

**Where action is not one in equity, Supreme Court is without jurisdiction, etc.**

Case the Court of Appeals transferred

Title to Land

1. In General

**Appeal of judgment determining local church held property in trust for national church within Supreme**

to the Supreme Court was returned to the Court of Appeals because the matter was not an equity case that triggered the Supreme Court's jurisdiction; the issues raised in the case, which placed an implied trust on disputed property, were legal in nature, and the issues did not relate to the propriety of an implied trust itself. *Reeves v. Newman*, 287 Ga. 317, 695 S.E.2d 626 (2010).

### 8. Specific Cases

**Equitable adoption.** — Appeal in which the substantive issue involves the legality or propriety of a trial court's declaration that a certain individual is or is not the virtually adopted child of a decedent is an action in equity that invokes the jurisdiction of the Supreme Court of Georgia under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2); to the extent *Walden v. Burke*, 282 Ga. App. 154, 637 S.E.2d 859 (Ga. Ct. App. 2006) may have been read as indicating the contrary, it was disapproved. *Morgan v. Howard*, 285 Ga. 512, 678 S.E.2d 882 (2009).

**Action involving riparian rights to water.** — Because equitable principles were at the core of a trial court's determination as to whether an appellee had made a reasonable use of the water the appellee shared with the appellants, jurisdiction over the appeal was properly in the Supreme Court of Georgia under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2). *Tunison v. Harper*, 286 Ga. 687, 690 S.E.2d 819 (2010).

**Interpretation of trust not within supreme court's jurisdiction over equity cases.** — Appeals that involve the proper interpretation of a trust provision do not come within the supreme court's general appellate jurisdiction over "equity cases," Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2), because the resolution of that legal issue will affect the administration of the trust. *Durham v. Durham*, No. S12A0607, 2012 Ga. LEXIS 577 (June 18, 2012).

Appeals challenging orders granting and denying motions for summary judgment were transferred to the court of appeals because the cases did not come within the supreme court's appellate jurisdiction over "equity cases" under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2); the sole issue presented on appeal was how to interpret a specific provision of a legal document, the in terrorem clause of the trust, which was a straightforward legal question and one that did not require any analysis that could be termed an evaluation of equitable considerations. *Durham v. Durham*, No. S12A0607, 2012 Ga. LEXIS 577 (June 18, 2012).

### Divorce and Alimony

#### Contempt order entered in divorce case.

Georgia Supreme Court, as opposed to the Georgia Court of Appeals, had jurisdiction over a discretionary appeal by a former spouse of a contempt ruling relating to a property distribution portion of a divorce decree pursuant to Ga. Const. 1983, Art. VI, Sec. VI, Para. III(6) as the application for contempt was ancillary to the divorce action and not a new civil action; thus, it fell within the Georgia Supreme Court's jurisdiction over divorce and alimony cases. *Morris v. Morris*, 284 Ga. 748, 670 S.E.2d 84 (2008).

### Other Cases

**Class action challenging cheating on exam.** — In an appeal pursuant to Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2), arising from a class action suit challenging cheating on a city's firefighter exam, a trial court abused the court's discretion in fashioning injunctive relief specific to appealing non-party firefighters because the firefighters were not bound by the judgment since the firefighters were never joined in the action. *Barham v. City of Atlanta*, 292 Ga. 375, 738 S.E.2d 52 (2013).

Paragraph IV. Jurisdiction over questions of law from state appellate or federal district or appellate courts.

JUDICIAL DECISIONS

**No certification for moot questions.** — While federal district courts could certify open questions of law under the Georgia state constitution and relevant state statutes to the Supreme Court of Georgia under Ga. Const. 1983, Art. VI, Sec. VI, Para. IV, O.C.G.A. § 15-2-9, and Ga. Sup. Ct. R. 46-48, because the direct actions by plaintiff insureds against defendant insurer were barred by O.C.G.A. § 33-7-11 for failure to have first obtained a judgment against their uninsured motorists, the insureds’ request for certification of a

question of law to the Supreme Court of Georgia, to determine whether Georgia precedent prohibited the insurer from asserting set-offs in the payment of uninsured motorist personal injury claims was not warranted. *Harden v. State Farm Mut. Auto. Ins. Co.*, No. 08-15008, 2009 U.S. App. LEXIS 16095 (11th Cir. July 22, 2009).  
**Cited** in *Hardin v. NBC Universal, Inc.*, 283 Ga. 477, 660 S.E.2d 374 (2008); *Trinity Outdoor, LLC v. Cent. Mut. Ins. Co.*, 285 Ga. 583, 679 S.E.2d 10 (2009).

Paragraph VI. Decisions of Supreme Court binding.

JUDICIAL DECISIONS

**Cited** in *Flores v. State*, 298 Ga. App. 574, 680 S.E.2d 609 (2009); *State v. Smith*, 308 Ga. App. 345, 707 S.E.2d 560 (2011); *Jenkins v. Smith*, 308 Ga. App. 762, 709

S.E.2d 23 (2011); *Bunn v. State*, 291 Ga. 183, 728 S.E.2d 569 (2012); *Tender Loving Health Care Servs. of Ga., LLC v. Ehrlich*, 318 Ga. App. 560, 734 S.E.2d 276 (2012).

SECTION VII.

SELECTION, TERM, COMPENSATION, AND DISCIPLINE OF JUDGES

Paragraph VII. Discipline, removal, and involuntary retirement of judges.

JUDICIAL DECISIONS

**Probate judge who allowed defendants to “buy out” their community service sentences was removed from office.** — Probate judge who told criminal defendants they had the burden of proving their innocence, who allowed defendants to “buy out” their community service sentences and kept the proceeds in a bank account that the judge controlled, participated in ex parte communications, insulted and abused parties in the judge’s court, and disposed of cases outside the jurisdiction of the probate court, was found in violation of Ga. Code Jud. Con-

duct Canons 1, 2, and 3, Ga. Const. 1983, Art. VI, Sec. VII, Para. VII(a), and O.C.G.A. §§ 16-10-32 and 40-13-26, was removed from office and barred from seeking judicial office again. *Inquiry Concerning Fowler*, 287 Ga. 467, 696 S.E.2d 644 (2010).  
**Judge properly removed from office.** — Magistrate court judge was permanently removed from office, pursuant to Ga. Const. 1983, Art. VI, Sec. VII, Para. VII(a), for violating Ga. Code Jud. Conduct Canons 1-3 by using illegal drugs, forcibly kicking in doors at a man’s home

at the request of a relative, pulling out a gun in front of at least one colleague, and refusing to work assigned hours. Inquiry

Concerning Judge (Peters), 289 Ga. 633, 715 S.E.2d 56 (2011).

SECTION VIII.

DISTRICT ATTORNEYS

**Law reviews.** — For article, “The Prosecuting Attorney in Georgia’s Juvenile Courts,” see 13 Ga. St. B.J. 27 (2008).

**Paragraph I. District attorneys; vacancies; qualifications; compensation; duties; immunity.**

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

**Cited** in *Luangkhot v. State*, 292 Ga. 423, 736 S.E.2d 397 (2013).

SECTION IX.

GENERAL PROVISIONS

**Paragraph I. Administration of the judicial system; uniform court rules; advice and consent of councils.**

JUDICIAL DECISIONS

**Cited** in *O’Kelley v. State*, 284 Ga. 758, 670 S.E.2d 388 (2008).

**Paragraph II. Disposition of cases.**

**Law reviews.** — For article, “Setting the Record Straight: A Proposal to Save Time and Trees,” see 14 Ga. St. B.J. 14 (2008). For article, “May It Please the

Court.’ Tips on Effective Appellate Advocacy from Start to Finish,” see 16 (No. 1) Ga. St. B.J. 28 (2010).

ARTICLE VII.

TAXATION AND FINANCE

Section

I. Power of Taxation.

IV. State Debt.

SECTION I.  
POWER OF TAXATION

Paragraph

III. Uniformity; classification of property; assessment of agricultural land; utilities.

Paragraph I. Taxation; limitations on grants of tax powers.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

**Authority of municipality to collect occupation tax.** — First city lacked authority to collect an occupation tax on professional or business activities within a second city's limits because the first city did not identify any constitutional provision or general law that authorized the first city to levy, assess, and collect an occupation tax on businesses and practi-

tioners that were not located in that city's limits, and to the extent an agreement between the cities purported to vest in the first city the authority to collect an occupation tax on businesses located within the second city's limits, the contract was unenforceable; a contract between municipalities, however, is not a general law. *City of Atlanta v. City of College Park*, 311 Ga. App. 62, 715 S.E.2d 158 (2011).

Paragraph III. Uniformity; classification of property; assessment of agricultural land; utilities.

(a) All taxes shall be levied and collected under general laws and for public purposes only. Except as otherwise provided in subparagraphs (b), (c), (d), (e), and (f) of this Paragraph, all taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

(b)(1) Except as otherwise provided in this subparagraph (b), classes of subjects for taxation of property shall consist of tangible property and one or more classes of intangible personal property including money; provided, however, that any taxation of intangible personal property may be repealed by general law without approval in a referendum effective for all taxable years beginning on or after January 1, 1996.

(2) Subject to the conditions and limitations specified by law, each of the following types of property may be classified as a separate class of property for ad valorem property tax purposes and different rates, methods, and assessment dates may be provided for such properties:

(A) Trailers.

(B) Mobile homes other than those mobile homes which qualify the owner of the home for a homestead exemption from ad valorem taxation.

(C) Heavy-duty equipment motor vehicles owned by nonresidents and operated in this state.

(3) Motor vehicles may be classified as a separate class of property for ad valorem property tax purposes, and such class may be divided into separate subclasses for ad valorem purposes. The General Assembly may provide by general law for the ad valorem taxation of motor vehicles including, but not limited to, providing for different rates, methods, assessment dates, and taxpayer liability for such class and for each of its subclasses and need not provide for uniformity of taxation with other classes of property or between or within its subclasses. The General Assembly may also determine what portion of any ad valorem tax on motor vehicles shall be retained by the state. As used in this subparagraph, the term “motor vehicles” means all vehicles which are self-propelled.

(c) Tangible real property, but no more than 2,000 acres of any single property owner, which is devoted to bona fide agricultural purposes shall be assessed for ad valorem taxation purposes at 75 percent of the value which other tangible real property is assessed. No property shall be entitled to receive the preferential assessment provided for in this subparagraph if the property which would otherwise receive such assessment would result in any person who has a beneficial interest in such property, including any interest in the nature of stock ownership, receiving the benefit of such preferential assessment as to more than 2,000 acres. No property shall be entitled to receive the preferential assessment provided for in this subparagraph unless the conditions set out below are met:

(1) The property must be owned by:

(A)(i) One or more natural or naturalized citizens;

(ii) An estate of which the devisee or heirs are one or more natural or naturalized citizens; or

(iii) A trust of which the beneficiaries are one or more natural or naturalized citizens; or

(B) A family-owned farm corporation, the controlling interest of which is owned by individuals related to each other within the fourth degree of civil reckoning, or which is owned by an estate of which the devisee or heirs are one or more natural or naturalized citizens, or which is owned by a trust of which the beneficiaries are one or more natural or naturalized citizens, and such corporation derived 80 percent or more of its gross income from bona fide

agricultural pursuits within this state within the year immediately preceding the year in which eligibility is sought.

(2) The General Assembly shall provide by law:

(A) For a definition of the term “bona fide agricultural purposes,” but such term shall include timber production;

(B) For additional minimum conditions of eligibility which such properties must meet in order to qualify for the preferential assessment provided for herein, including, but not limited to, the requirement that the owner be required to enter into a covenant with the appropriate taxing authorities to maintain the use of the properties in bona fide agricultural purposes for a period of not less than ten years and for appropriate penalties for the breach of any such covenant.

(3) In addition to the specific conditions set forth in this subparagraph (c), the General Assembly may place further restrictions upon, but may not relax, the conditions of eligibility for the preferential assessment provided for herein.

(d)(1) The General Assembly shall be authorized by general law to establish as a separate class of property for ad valorem tax purposes any tangible real property which is listed in the National Register of Historic Places or in a state historic register authorized by general law. For such purposes, the General Assembly is authorized by general law to establish a program by which certain properties within such class may be assessed for taxes at different rates or valuations in order to encourage the preservation of such historic properties and to assist in the revitalization of historic areas.

(2) The General Assembly shall be authorized by general law to establish as a separate class of property for ad valorem tax purposes any tangible real property on which there have been releases of hazardous waste, constituents, or substances into the environment. For such purposes, the General Assembly is authorized by general law to establish a program by which certain properties within such class may be assessed for taxes at different rates or valuations in order to encourage the cleanup, reuse, and redevelopment of such properties and to assist the revitalization thereof by encouraging remedial action.

(e) The General Assembly shall provide by general law:

(1) For the definition and methods of assessment and taxation, such methods to include a formula based on current use, annual productivity, and real property sales data, of: “bona fide conservation use property” to include bona fide agricultural and timber land not to exceed 2,000 acres of a single owner; and “bona fide residential

transitional property,” to include private single-family residential owner occupied property located in transitional developing areas not to exceed five acres of any single owner. Such methods of assessment and taxation shall be subject to the following conditions:

(A) A property owner desiring the benefit of such methods of assessment and taxation shall be required to enter into a covenant to continue the property in bona fide conservation use or bona fide residential transitional use; and

(B) A breach of such covenant within ten years shall result in a recapture of the tax savings resulting from such methods of assessment and taxation and may result in other appropriate penalties;

(2) That standing timber shall be assessed only once, and such assessment shall be made following its harvest or sale and on the basis of its fair market value at the time of harvest or sale. Said assessment shall be two and one-half times the assessed percentage of value fixed by law for other real property taxed under the uniformity provisions of subparagraph (a) of this Paragraph but in no event greater than its fair market value; and for a method of temporary supplementation of the property tax digest of any county if the implementation of this method of taxing timber reduces the tax digest by more than 20 percent, such supplemental assessed value to be assigned to the properties otherwise benefiting from such method of taxing timber.

(f)(1) The General Assembly shall provide by general law for the definition and methods of assessment and taxation, such methods to include a formula based on current use, annual productivity, and real property sales data, of “forest land conservation use property” to include only forest land each tract of which exceeds 200 acres of a qualified owner. Such methods of assessment and taxation shall be subject to the following conditions:

(A) A qualified owner shall consist of any individual or individuals or any entity registered to do business in this state;

(B) A qualified owner desiring the benefit of such methods of assessment and taxation shall be required to enter into a covenant to continue the property in forest land use;

(C) All contiguous forest land conservation use property of an owner within a county for which forest land conservation use assessment is sought under this subparagraph shall be in a single covenant;

(D) A breach of such covenant within 15 years shall result in a recapture of the tax savings resulting from such methods of

assessment and taxation and may result in other appropriate penalties; and

(E) The General Assembly may provide by general law for a limited exception to the 200 acre requirement in the case of a transfer of ownership of all or a part of the forest land conservation use property during a covenant period to another owner qualified to enter into an original forest land conservation use covenant if the original covenant is continued by both such acquiring owner and the transferor for the remainder of the term, in which event no breach of the covenant shall be deemed to have occurred even if the total size of a tract from which the transfer was made is reduced below 200 acres.

(2) No portion of an otherwise eligible tract of forest land conservation use property shall be entitled to receive simultaneously special assessment and taxation under this subparagraph and either subparagraph (c) or (e) of this Paragraph.

(3)(A) The General Assembly shall appropriate an amount for assistance grants to counties, municipalities, and county and independent school districts to offset revenue loss attributable to the implementation of this subparagraph. Such grants shall be made in such manner and shall be subject to such procedures as may be specified by general law.

(B) If the forest land conservation use property is located in a county, municipality, or county or independent school district where forest land conservation use value causes an ad valorem tax revenue reduction of 3 percent or less due to the implementation of this subparagraph, in each taxable year in which such reduction occurs, the assistance grants to the county, each municipality located therein, and the county or independent school districts located therein shall be in an amount equal to 50 percent of the amount of such reduction.

(C) If the forest land conservation use property is located in a county, municipality, or county or independent school district where forest land conservation use value causes an ad valorem tax revenue reduction of more than 3 percent due to the implementation of this subparagraph, in each taxable year in which such reduction occurs, the assistance grants to the county, each municipality located therein, and the county or independent school districts located therein shall be as follows:

(i) For the first 3 percent of such reduction amount, in an amount equal to 50 percent of the amount of such reduction; and

(ii) For the remainder of such reduction amount, in an amount equal to 100 percent of the amount of such remaining reduction amount.

- (4) Such revenue reduction shall be calculated by utilizing forest land fair market value. For purposes of this subparagraph, forest land fair market value means the 2008 fair market value of the forest land. Such 2008 valuation may increase from one taxable year to the next by a rate equal to the percentage change in the price index for gross output of state and local government from the prior year to the current year as defined by the National Income and Product Accounts and determined by the United States Bureau of Economic Analysis and indicated by the Price Index for Government Consumption Expenditures and General Government Gross Output (Table 3.10.4). Such revenue reduction shall be determined by subtracting the aggregate forest land conservation use value of qualified properties from the aggregate forest land fair market value of qualified properties for the applicable tax year and the resulting amount shall be multiplied by the millage rate of the county, municipality, or county or independent school district.
- (5) For purposes of this subparagraph, the forest land conservation use value shall not include the value of the standing timber located on forest land conservation use property.

(g) The General Assembly may provide for a different method and time of returns, assessments, payment, and collection of ad valorem taxes of public utilities, but not on a greater assessed percentage of value or at a higher rate of taxation than other properties, except that property provided for in subparagraph (c), (d), (e), or (f) of this Paragraph. (Ga. Const. 1983, Art. 7, § 1, Para. 3; Ga. L. 1984, p. 1711, § 1/HR 589; Ga. L. 1988, p. 2119, §§ 1, 2/SR 265; Ga. L. 1990, p. 2437, §§ 1, 2/HR 836; Ga. L. 1992, p. 3336, § 1/HR 715; Ga. L. 1996, p. 1665, § 1/HR 734; Ga. L. 2002, p. 1504, § 1/HR 1111; Ga. L. 2008, p. 1209, §§ 1, 2/HR 1276.)

**Editor’s notes.** — The constitutional amendment (Ga. L. 2008, p. 1209, §§ 1 and 2), which in subparagraph (a), substituted “subparagraphs (b), (c), (d), (e), and (f) of this Paragraph,” for “subparagraphs (b), (c), (d), and (e)”; added present subparagraph (f); redesignated former subparagraph (f) as subparagraph (g); and, in

subparagraph (g), substituted “subparagraph (c), (d), (e), or (f) of this Paragraph” for “subparagraph (c), (d), or (e)” at the end was ratified at the general election held on November 4, 2008.

**Law reviews.** — For article, “Revenue and Taxation: Sales and Use Taxes,” see 29 Ga. St. U.L. Rev. 112 (2012).

JUDICIAL DECISIONS

ANALYSIS

UNIFORMITY OF TAXATION  
ESTABLISHING PROPERTY VALUE  
TAX EXEMPT PROPERTY

### Uniformity of Taxation

**Challenge reviewed first on administrative appeal.** — Property owners improperly challenged a tax re-valuation by a county in a Georgia trial court because the owners had an adequate remedy at law pursuant to O.C.G.A. § 48-5-311 in an appeal to a county board of tax equalization (BOE) as the BOE had to first address procedural errors and errors in methodology to value the property under § 48-5-311(e)-(g); constitutional claims, such as claims of the uniformity of assessment under Ga. Const. 1983, Art. VII, Sec. I, Para. III also had to be addressed first before the BOE. *Hooten v. Thomas*, 297 Ga. App. 487, 677 S.E.2d 670 (2009).

### Establishing Property Value

**Authority of county board of tax assessors.** — The Court of Appeals of Georgia properly held that, although the county board of tax assessors could alter the assessment ratio proposed by the Georgia Revenue Commissioner on land owned by a utility in the course of making a final assessment of a utility's property, it could not alter the apportioned fair market value for the property used by the Commissioner in its proposed assessment. *Monroe County v. Ga. Power Co.*, 283 Ga. 12, 655 S.E.2d 817 (2008).

**Home site value added to all residences.** — A taxpayer did not show that the taxpayer's property was not uniformly taxed. The \$2,500 home site value added to all residential property in the county was only one factor in the valuation of such property, and there was no evidence

that the home site value resulted in some houses not being assessed at their fair market value. *Smith v. Elbert County Bd. of Tax Assessors*, 292 Ga. App. 417, 664 S.E.2d 786 (2008), overruled on other grounds by *Gilmer County Bd. of Tax Assessors v. Spence*, 309 Ga. App. 482, 711 S.E.2d 51 (2011).

**Club membership appurtenant to property.** — Although taxpayers' memberships in a club were not subject to taxation, if a taxpayer relinquished that membership upon sale of the taxpayer's real estate, the buyer could apply for immediate membership, and such an application would normally be granted. Therefore, a county board of tax assessors would have violated Ga. Const. 1983, Art. VII, Sec. I, Para. III and O.C.G.A. § 48-5-1 if it excluded the enhanced value of the properties attributable to the right to apply for such memberships from ad valorem taxation, because it was part of the properties' fair market value. *Morton v. Glynn County Bd. of Tax Assessors*, 294 Ga. App. 901, 670 S.E.2d 528 (2008).

### Tax Exempt Property

**County homestead exemptions did not violate the Uniformity Clause.** — County homestead exemptions were constitutional under the Tax Exemption Clauses of the Georgia Constitution, Ga. Const. 1983, Art. VII, Sec. II, Para. II, although the nature of tax exemptions was at odds with the equality of taxation sought by the Uniformity Clause, Ga. Const. 1983, Art. VII, Sec. I, Para. III. *Blevins v. Dade County Bd. of Tax Assessors*, 288 Ga. 113, 702 S.E.2d 145 (2010).

## SECTION II.

### EXEMPTIONS FROM AD VALOREM TAXATION

**Editor's notes.** — The constitutional amendment proposed in Ga. L. 1986, p. 1625, Sec. 1, which would have added a

new Paragraph VI relating to development districts, was defeated in the General Election on November 4, 1986.

Paragraph II. Exemptions from taxation of property.

JUDICIAL DECISIONS

**County homestead exemptions did not violate the Uniformity Clause.** — County homestead exemptions were constitutional under the Tax Exemption Clauses of the Georgia Constitution, Ga. Const. 1983, Art. VII, Sec. II, Para. II,

although the nature of homestead exemptions was at odds with the equality of taxation sought by the Uniformity Clause, Ga. Const. 1983, Art. VII, Sec. I, Para. III. *Blevins v. Dade County Bd. of Tax Assessors*, 288 Ga. 113, 702 S.E.2d 145 (2010).

SECTION IV.  
STATE DEBT

Paragraph	Paragraph
XII. Multiyear contracts for energy efficiency or conservation improvement.	XIII. Multiyear rental agreements.

**Editor’s notes.** — The constitutional amendment proposed by Ga. L. 2010, p. 1263, § 1, which would have added Paragraph XII to allow the state to execute

multiyear contracts for long-term transportation projects, was defeated at the general election held on November 2, 2010.

Paragraph X. Assumption of debts forbidden; exceptions.

JUDICIAL DECISIONS

**Costs and attorney’s fees for public defender.** — Because appointment of counsel to represent a defendant in a death penalty case occurred before its effective date, the application of former O.C.G.A. § 17-12-127(b) regarding payment of costs and attorney’s fees by the

Georgia Public Defender Standards Council did not violate the prohibition on the state’s assumption of prior debts as set forth in Ga. Const. 1983, Art. VII, Sec. IV, Para. X. *Ga. Pub. Defender Stds. Council v. State*, 285 Ga. 169, 675 S.E.2d 25 (2009).

Paragraph XII. Multiyear contracts for energy efficiency or conservation improvement.

The General Assembly may by general law authorize state governmental entities to incur debt for the purpose of entering into multiyear contracts for governmental energy efficiency or conservation improvement projects in which payments are guaranteed over the term of the contract by vendors based on the realization of specified savings or revenue gains attributable solely to the improvements; provided, however, that any such contract shall not exceed ten years unless otherwise provided by general law. (Ga. Const. 1983, Art. 7, § 4, Para. 12, approved by Ga. L. 2010, p. 1264, § 1/SR 1231.)

**Editor’s notes.** — The constitutional amendment (Ga. L. 2010, p. 1264, § 1), which added Paragraph XII to authorize state multiyear contracts for governmen-

tal energy efficiency or conservation improvement projects, was ratified at the general election held on November 2, 2010.

**Paragraph XIII. Multiyear rental agreements.**

The General Assembly may by general law authorize the State Properties Commission, the Board of Regents of the University System of Georgia, and the Georgia Department of Labor to enter into rental agreements for the possession and use of real property without obligating present funds for the full amount of obligation the state may bear under the full term of any such rental agreement. Any such agreement shall provide for the termination of the agreement in the event of insufficient funds. (Ga. Const. 1983, Art. 7, § 4, Para. 13, approved by Ga. L. 2012, p. 1363, § 1/SR 84.)

**Editor’s notes.** — The constitutional amendment (Ga. L. 2012, p. 1363, § 1/SR 84), which added Paragraph XIII to authorize state multiyear rental agreements for

the possession and use of real property without obligating present funds, was ratified at the general election held on November 6, 2012.

**ARTICLE VIII.**

**EDUCATION**

**Section**

- I. Public Education.
- V. Local School Systems.

**Law reviews.** — For article, “‘Simplify You, Classify You’: Stigma, Stereotypes and Civil Rights in Disability Classification Systems,” see 25 Ga. St. U. L. Rev.

607 (2009). For article, “Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities,” see 25 Ga. St. U. L. Rev. 641 (2009).

**SECTION I.**

**PUBLIC EDUCATION**

**Paragraph**

- I. Public education; free public education prior to college or postsecondary level; support by taxation.

**Law reviews.** — For comment, “Is Economic Integration the Fourth Wave in School Finance Litigation,” see 56 Emory L.J. 1613 (2007).

**Paragraph I. Public education; free public education prior to college or postsecondary level; support by taxation.**

The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation, and the General Assembly may by general law provide for the establishment of education policies for such public education. The expense of other public education shall be provided for in such manner and in such amount as may be provided by law. (Ga. Const. 1983, Art. 8, § 1, Para. 1; Ga. L. 2012, p. 1364, § 1/HR 1162.)

**Editor’s notes.** — The constitutional amendment (Ga. L. 2012, p. 1364, § 1/HR 1162), which added “, and the General Assembly may by general law provide for the establishment of education policies for such public education” at the end of the second sentence, was ratified at the general election held on November 6, 2012.

**Law reviews.** — For article on the 2012 Constitutional amendment, see 29 Ga. St. U.L. Rev. 1 (2012).  
For note and comment, “School Choice: Constitutionality and Possibility in Georgia,” see 24 Ga. St. U.L. Rev. 587 (2007).

SECTION V.  
LOCAL SCHOOL SYSTEMS

Paragraph	Paragraph
I. School systems continued; consolidation of school systems authorized; new independent school systems prohibited.	VII. Special schools.

**Paragraph I. School systems continued; consolidation of school systems authorized; new independent school systems prohibited.**

Authority is granted to county and area boards of education to establish and maintain public schools within their limits; provided, however, that the authority provided for in this Paragraph shall not diminish any authority of the General Assembly otherwise granted under this article, including the authority to establish special schools as provided for in Article VIII, Section V, Paragraph VII. Existing county and independent school systems shall be continued, except that the General Assembly may provide by law for the consolidation of two or more county school systems, independent school systems, portions thereof, or any combination thereof into a single county or area school system under the control and management of a county or area board of education, under such terms and conditions as the General Assembly may prescribe; but no such consolidation shall become effective until

approved by a majority of the qualified voters voting thereon in each separate school system proposed to be consolidated. No independent school system shall hereafter be established. (Ga. Const. 1983, Art. 8, § 5, Para. 1; Ga. L. 2012, p. 1364, § 2/HR 1162.)

**Editor's notes.** — The constitutional amendment (Ga. L. 2012, p. 1364, § 2/HR 1162), which added “; provided, however, that the authority provided for in this Paragraph shall not diminish any authority of the General Assembly otherwise granted under this article, including the authority to establish special schools as

provided for in Article VIII, Section V, Paragraph VII” at the end of the first sentence, was ratified at the general election held on November 6, 2012.

**Law reviews.** — For article on the 2012 Constitutional amendment, see 29 Ga. St. U.L. Rev. 1 (2012).

## JUDICIAL DECISIONS

**Cited** in *Gwinnett County Sch. Dist. v. Cox*, 289 Ga. 265, 710 S.E.2d 773 (2011).

## Paragraph II. Boards of education.

## JUDICIAL DECISIONS

### ANALYSIS

#### COUNTY EDUCATION BOARDS

##### 2. ELECTION OR APPOINTMENT

#### County Education Boards

##### 2. Election or Appointment

**Terms of school board members.** — Term limitations of Telfair County Tenure Law, 1963 Ga. Laws 705, do not apply to school board members because the Tenure Law amends Ga. Const. 1983, Art. IX and not Ga. Const. 1983, Art. VIII; thus, a member who was serving a third consecutive term was not subject to the Tenure Law. *Dyal v. Pope*, 283 Ga. 463, 660 S.E.2d 725 (2008).

O.C.G.A. § 20-2-52 did not limit terms school board member could serve under the Telfair County Tenure Law, 1963 Ga. Laws 705; although the Telfair County

Tenure Law is a constitutional amendment, it is not a constitutional amendment that applies to Ga. Const. 1983, Art. VIII and school board members. *Dyal v. Pope*, 283 Ga. 463, 660 S.E.2d 725 (2008).

**Removal of county board of education members.** — Superior court erred in denying the county board of education members’ request to reverse the governor’s order removing the members from office under O.C.G.A. § 45-10-4 for violating O.C.G.A. § 45-10-3; O.C.G.A. § 45-10-3 does not embrace entities created by the Constitution of Georgia, and county school boards are creations of Ga. Const. 1983, Art. VIII, Sec. V, Para. II. *Roberts v. Deal*, 290 Ga. 705, 723 S.E.2d 901 (2012).

## Paragraph VII. Special schools.

(a) The General Assembly may provide by law for the creation of special schools in such areas as may require them and may provide for the participation of local boards of education in the establishment of such schools under such terms and conditions as it may provide; but no

bonded indebtedness may be incurred nor a school tax levied for the support of special schools without the approval of the local board of education and a majority of the qualified voters voting thereon in each of the systems affected. Any special schools shall be operated in conformity with regulations of the State Board of Education pursuant to provisions of law. Special schools may include state charter schools; provided, however, that special schools shall only be public schools. A state charter school under this section shall mean a public school that operates under the terms of a charter between the State Board of Education and a charter petitioner; provided, however, that such state charter schools shall not include private, sectarian, religious, or for profit schools or private educational institutions; provided, further, that this Paragraph shall not be construed to prohibit a local board of education from establishing a local charter school pursuant to Article VIII, Section V, Paragraph I. The state is authorized to expend state funds for the support and maintenance of special schools in such amount and manner as may be provided by law; provided, however, no deduction shall be made to any state funding which a local school system is otherwise authorized to receive pursuant to general law as a direct result or consequence of the enrollment in a state charter school of a specific student or students who reside within the geographic boundaries of the local school system.

(b) Nothing contained herein shall be construed to affect the authority of local boards of education or of the state to support and maintain special schools created prior to June 30, 1983. (Ga. Const. 1983, Art. 8, § 5, Para. 7; Ga. L. 2012, p. 1364, § 3/HR 1162.)

**Editor’s notes.** — The constitutional amendment (Ga. L. 2012, p. 1364, § 3/HR 1162), which substituted the present provisions of subparagraph (a) for the former provisions, which read: “(a) The General Assembly may provide by law for the creation of special schools in such areas as may require them and may provide for the participation of local boards of education in the establishment of such schools under such terms and conditions as it may provide; but no bonded indebtedness may be incurred nor a school tax levied for the support of special schools without the approval of a majority of the qualified voters voting thereon in each of the systems affected. Any special schools shall be op-

erated in conformity with regulations of the State Board of Education pursuant to provisions of law. The state is authorized to expend funds for the support and maintenance of special schools in such amount and manner as may be provided by law.”, was ratified at the general election held on November 6, 2012.

**Law reviews.** — For article on the 2012 Constitutional amendment, see 29 Ga. St. U.L. Rev. 1 (2012). For article, “Education: Elementary and Secondary Education,” see 29 Ga. St. U.L. Rev. 1 (2012).

For note and comment, “School Choice: Constitutionality and Possibility in Georgia,” see 24 Ga. St. U. L. Rev. 587 (2007).

JUDICIAL DECISIONS

**State Charter School Act conflicts with provision.** — Georgia Charter

Schools Commission Act, O.C.G.A. § 20-2-2081 et seq., violated the special

schools provision of Ga. Const. 1983, Art. VIII, Sec. V, Para. VII(a) by authorizing a state commission to establish competing state-created general K-12 schools under the guise of being special schools. The special schools authorized by the constitution were not competitors with locally controlled schools in regard to the educa-

tion of general K-12 students; rather, the constitutionally significant matters that made a school “special” were directly related to the school itself, the school’s student body, and the school’s curriculum. *Gwinnett County Sch. Dist. v. Cox*, 289 Ga. 265, 710 S.E.2d 773 (2011).

SECTION VI.

LOCAL TAXATION FOR EDUCATION

Paragraph I. Local taxation for education.

JUDICIAL DECISIONS

**The use of school taxes to finance a redevelopment plan along 22 miles of historical rail segments violated Ga. Const. 1983, Art. VIII, Sec. VI, Para. I(b)** because it was not “necessary or incidental” to public schools or public education. The plan benefitted all citizens and had little if any nexus to the actual operation of public schools. *Woodham v. City of Atlanta*, 283 Ga. 95, 657 S.E.2d 528 (2008).

**Homestead exemption did not vio-**

**late this paragraph.** — Court rejected a taxpayer’s contention that a school tax homestead exemption violated Ga. Const. 1983, Art. VIII, Sec. VI, Para. I, which required that school taxes be imposed on correctly assessed values, because the school taxes would be imposed on correctly assessed values, but the values of certain properties would then be reduced by the homestead exemption. *Blevins v. Dade County Bd. of Tax Assessors*, 288 Ga. 113, 702 S.E.2d 145 (2010).

OPINIONS OF THE ATTORNEY GENERAL

**Sharing of services between boards of education unauthorized.** — Georgia boards of education are not empowered to share services by creating and utilizing a nonprofit corporation such as the Consor-

tium for Adequate School Funding in Georgia, Inc., for the purpose of challenging state school funding by litigation or otherwise. 2009 Op. Att’y Gen. No. 2009-3.

Paragraph IV. Sales tax for educational purposes.

JUDICIAL DECISIONS

**No excess proceeds to refund.** — Trial court properly denied a taxpayer’s writ of mandamus filed under Ga. Const. 1983, Art. VIII, Sec. VI, Para. IV(h) against a school district seeking the return of excess proceeds collected pursuant

to an educational sales and use tax approved by referendum because there was no excess to refund. *Marsh v. Clarke County Sch. Dist.*, 292 Ga. 28, 732 S.E.2d 443 (2012).

SECTION VII.  
EDUCATIONAL ASSISTANCE

**Cross references.** — State Veterinary Education, T. 20, C. 3, P. 6A.

ARTICLE IX.  
COUNTIES AND MUNICIPAL CORPORATIONS

Section

II. Home Rule for Counties and Municipalities.

**Editor’s notes.** — The constitutional amendment proposed in Ga. L. 2007, p. 775, § 1, which would have revised Article IX by adding a new Section VIII, authorizing the General Assembly to provide by

general law for the creation and comprehensive regulation of infrastructure development districts, was defeated in the general election held on November 4, 2008.

SECTION I.  
COUNTIES

Paragraph I. Counties a body corporate and politic.

JUDICIAL DECISIONS

ANALYSIS

COUNTY GOVERNMENT

County Government

**School board members.** — Term limitations of Telfair County Tenure Law, 1963 Ga. Laws 705, do not apply to school board members because the Tenure Law

amends Ga. Const. 1983, Art. IX and not Ga. Const. 1983, Art. VIII; thus, a member who was serving a third consecutive term was not subject to the Tenure Law. *Dyal v. Pope*, 283 Ga. 463, 660 S.E.2d 725 (2008).

Paragraph III. County officers; election; term; compensation.

JUDICIAL DECISIONS

ANALYSIS

COUNTY OFFICERS

1. IN GENERAL

County Officers

1. In General

**Sheriff is a county officer.**

The Georgia Tort Claims Act did not apply to a wrongful death suit brought

against a county, a sheriff, and a deputy; under Ga. Const. 1983, Art. IX, Sec. I, Para. III(a), sheriffs are county officers and O.C.G.A. § 50-21-22(5) excludes counties from the Act, and moreover the county paid the salaries and employee

benefits of the sheriff and the sheriff's employees and funded the sheriff's department. *Nichols v. Prather*, 286 Ga. App. 889, 650 S.E.2d 380 (2007), cert. denied, 2007 Ga. LEXIS 766 (Ga. 2007).

Trial court properly denied a sheriff's motion to dismiss the negligence suit brought against the sheriff and eight other employees of the sheriff's department arising from the death of a court reporter as the sheriff was an elected official and was not a county employee; therefore, the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. § 34-9-11(a), did not bar the suit. *Freeman v. Brandau*, 292 Ga. App. 300, 664 S.E.2d 299 (2008).

County sheriff's office was not a proper defendant in plaintiff's injury action because the sheriff's office was not an entity capable of being sued under Fed. R. Civ. P. 17 in that the sheriff was a constitutionally created office under both Ga. Const. 1983, Art. IX, Sec. I, Para. III(a), and Fla. Const. Art. 8, Sec. 1, and employees acted in the name of the sheriff and not as an employee of the sheriff's office under O.C.G.A. § 15-16-23 and Fla. Stat. § 30.07. *Harris v. Lawson*, No. 7:08-CV-70 (HL), 2008 U.S. Dist. LEXIS 78808 (M.D. Ga. Aug. 27, 2008).

Trial court did not err in dismissing a sheriff's deputy's widow's claims against the sheriff and the deputy's fellow deputies on the basis that the Worker's Com-

pensation Act, O.C.G.A. § 34-9-1 et seq., provided her exclusive remedy under O.C.G.A. § 34-9-11(a). The sheriff was the deputy's "employer" under Ga. Const. 1983, Art. IX, Sec. I, Para. III(a), and O.C.G.A. § 34-9-1(3). *Teasley v. Freeman*, 305 Ga. App. 1, 699 S.E.2d 39 (2010).

**Sheriff has no authority over commissions generated by use of county jail.** — County sheriff was not entitled to keep commissions received from a company that provided telephone services to county jail inmates as revenue generated using county property or facilities—such as the jail—was itself county property and therefore subject to county authority under O.C.G.A. § 36-5-22.1. Although a sheriff could collect certain fees, such as fees for attending court, O.C.G.A. § 15-16-21 provided that such fees had to be turned over to the county's treasurer or fiscal officer. *Lawson v. Lincoln County*, 292 Ga. App. 527, 664 S.E.2d 900 (2008), cert. denied, 2008 Ga. LEXIS 899 (Ga. 2008).

**Tax Commissioner's Office separate entity from county.** — Plaintiff could not dispute that the Tax Commissioner's Office (TCO) was a separate entity from Madison County. Plaintiff did not submit evidence sufficient for a reasonable jury to conclude that plaintiff was an employee of the county, not the TCO. *Epps v. Watson*, No. 3:05-CV-68 (CDL), 2008 U.S. Dist. LEXIS 87814 (M.D. Ga. Oct. 30, 2008).

## Paragraph IV. Civil service systems.

### JUDICIAL DECISIONS

**Termination of employee.** — Employee who was hired by a county solicitor general under O.C.G.A. § 15-18-71 was not an employee of the county, and the solicitor general did not bring the employee into the county's civil service sys-

tem under O.C.G.A. § 36-1-21(b). Therefore, the employee lacked a protected property interest in the job and could be terminated without cause and without a hearing. *Thomas v. Lee*, 286 Ga. 860, 691 S.E.2d 845 (2010).

## SECTION II.

### HOME RULE FOR COUNTIES AND MUNICIPALITIES

#### Paragraph

#### VII. Community redevelopment.

Paragraph I. Home rule for counties.

**Law reviews.** — For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
EMPLOYEES

General Consideration

**Ordinance constitutional.** — Trial court erred in declaring Miller County, Ga., Ordinance No. 10-01, § 2 unconstitutional because the ordinance did not violate Ga. Const. 1983, Art. IX, Sec. II, Para. I(c)(2) by affecting the composition or form of the Board of Commissioners of Miller County but conferred only administrative, rather than executive, authority on the chair of the Board’s finance committee; pursuant to Ga. Const. 1983, Art. IX, Sec. II, Para. I(b), the county had authority, as an incident of the county’s home rule power, to amend Ga. L. 1983, p. 4594, § 14. Bd. of Comm’rs v. Callan, 290 Ga. 327, 720 S.E.2d 608 (2012).

Trial court erred in declaring Miller County, Ga., Ordinance No. 10-01, § 3 unconstitutional because the ordinance did not constitute an action affecting the elective office of commissioner in violation of Ga. Const. 1983, Art. IX, Sec. II, Para. I(c)(1); section 3 did not, by itself, negatively impact on the ability of the commissioners to carry out the commissioners’ duties, but instead, § 3 gave the Commissioners of Miller County an additional option, similar to that given by general

law to many other county governing authorities, for purchasing goods, property, or services. Bd. of Comm’rs v. Callan, 290 Ga. 327, 720 S.E.2d 608 (2012).

**Legislation bodies governed by establishment clause for evaluating legislative prayer.** — Under Ga. Const. 1983, Art. IX, Sec. II, Para. I, a county commission and a county planning commission are legislative bodies governed by the U.S. Supreme Court’s Marsh standard for evaluating legislative prayer under the establishment clause of the First Amendment to the U.S. Constitution. Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008).

Employees

**Tax commissioner’s personnel decisions not state functions.**

Plaintiff could not dispute that the Tax Commissioner’s Office (TCO) was a separate entity from Madison County. Plaintiff did not submit evidence sufficient for a reasonable jury to conclude that plaintiff was an employee of the county, not the TCO. Epps v. Watson, No. 3:05-CV-68 (CDL), 2008 U.S. Dist. LEXIS 87814 (M.D. Ga. Oct. 30, 2008).

Paragraph III. Supplementary powers.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
POLICE AND FIRE PROTECTION

## General Consideration

**Zoning.** — Ga. Const. 1983, Art. IX, Sec. II, Para. III does not constitute authorization for a municipality to exercise any zoning powers. *Century Ctr. at Braselton, LLC v. Town of Braselton*, 285 Ga. 380, 677 S.E.2d 106 (2009).

## Police and Fire Protection

**Authority to arrest for traffic violations.** — A Henry County police officer was authorized to stop the defendant in Spalding County after an off-duty Henry County police officer reported seeing the defendant's vehicle weaving in and out of the defendant's lane and nearly hitting an abandoned vehicle. Under O.C.G.A. §§ 17-4-23 and 40-13-30, county police officers were authorized to arrest persons for traffic offenses in other jurisdictions. *Weldon v. State*, 291 Ga. App. 309, 661 S.E.2d 672 (2008).

**No authority to arrest outside of territorial jurisdiction.** — Arrest warrants issued by a Georgia court did not insulate a payee or a county deputy from liability under 42 U.S.C. § 1983 for caus-

ing a businesswoman who had given the payee postdated checks for merchandise to be arrested on bad check charges because the warrants were executed in Florida, outside the issuing court's territorial jurisdiction as set forth in Ga. Const. 1983, Art. IX, Sec. II, Para. III(b). *Brown v. Camden County*, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

**Authority to arrest outside of jurisdiction.** — Trial court did not err in granting police officers summary judgment in a citizen's action alleging false imprisonment, assault and battery, and intentional infliction of emotional distress in connection with the defendant's arrest because the arrest was lawful under O.C.G.A. § 17-4-20 since obstruction occurred in the officers' presence; even if the officers did not have probable cause to arrest the defendant, the officers had the authority and discretion to arrest outside the officers' jurisdiction for offenses committed in the officers' presence and, therefore, the officers' immunity could not be defeated by the officers' decision to arrest outside of the officers' jurisdiction. *Taylor v. Waldo*, 309 Ga. App. 108, 709 S.E.2d 278 (2011).

## Paragraph IV. Planning and zoning.

### JUDICIAL DECISIONS

#### ANALYSIS

#### BY MUNICIPALITIES AND COUNTIES

##### By Municipalities and Counties

**No zoning power over property outside town's territorial limits.** — With regard to the landowners' declaratory judgment, mandamus, and injunctive relief suit seeking damages against a town and its officials alleging the unconstitutionality and invalidity of an overlay zoning district, the trial court erred by denying the landowners' motion for partial summary judgment with regard to the landowners' claim that the town did not have any legal authority to impose the requirements of the overlay zoning ordinance for right-of-way improvements on the state route abutting the property since the property at issue was outside the territorial boundaries of the town, there-

fore, the requirements of the overlay zoning ordinance were invalid as to the property since the town had no zoning authority over the same. *Century Ctr. at Braselton, LLC v. Town of Braselton*, 285 Ga. 380, 677 S.E.2d 106 (2009).

**Permitting for signs.** — Void county sign ordinance could not be used as the basis for the denial of sign companies' applications for permits to construct billboards, and the invalidity of the ordinance resulted in there being no valid restriction on the construction of billboards in the county. Accordingly, the sign companies obtained vested rights in the issuance of the permits which the companies sought and the constitutional authority of cities that were subsequently formed to plan

and zone within the cities' jurisdictions was not violated. *Fulton County v. Action*

*Outdoor Adver., JV, LLC*, 289 Ga. 347, 711 S.E.2d 682 (2011).

## Paragraph V. Eminent domain.

### JUDICIAL DECISIONS

**County was authorized to exercise its right of eminent domain in connection with the expansion of a detention center** because the county had jurisdiction over the maintenance of jails in the county under O.C.G.A. § 36-9-5(a), the operation of a jail constituted a public purpose pursuant to Ga. Const. 1983, Art. IX, Sec. II, Para. V, and the property owner did not identify any general law limiting the right of the county to exercise its power of eminent domain; the condem-

nation of the owner's property was "reasonably necessary" to maintain the jail system within the county because concerns regarding security, costs, and duplication of effort were cited in support of expanding the facility, and strong evidence was presented that the expansion posed a viable and logical solution. *Brunswick Landing, LLC v. Glynn County*, 301 Ga. App. 288, 687 S.E.2d 271 (2009), cert. denied, No. S10C0558, 2010 Ga. LEXIS 246 (Ga. 2010).

## Paragraph VI. Special districts.

### JUDICIAL DECISIONS

#### Homestead Option Sales Tax.

Ga. L. 2007, p. 598, § 1 et seq., which amended the Homestead Option Sales and Use Tax (HOST) Act, O.C.G.A. § 48-8-100 et seq., did not change the purpose of the HOST approved by county voters when it provided for the distribution of HOST proceeds to the governing authority of each qualified municipality located in the special district; the tax for which it sought voter approval was within the special district within the county, and that was because the HOST was not a "county tax" but a district tax levied to provide for services within that special district pursuant to the authority granted by Ga. Const. 1983, Art. IX, Sec. II, Para. VI. *DeKalb County v. Perdue*, 286 Ga. 793, 692 S.E.2d 331 (2010).

Trial court did not err by holding that Ga. L. 2007, p. 598, § 1 et seq., which

amended the Homestead Option Sales and Use Tax (HOST) Act, O.C.G.A. § 48-8-100 et seq., did not violate Ga. Const. 1983, Art. IX, Sec. II, Para. VI, because although a tax levied and collected within a special district pursuant to Para. VI could only be used for the cost of providing services within that district, Para. VI did not require that the entity levying the special district tax be the same one providing the services within the district, such that funds emanating from the HOST could be used for services in that part of the county that was within the corporate borders of the qualified municipality only when the county and the city jointly so agreed; the Paragraph contains no language identifying any particular entity as the exclusive provider of local government services. *DeKalb County v. Perdue*, 286 Ga. 793, 692 S.E.2d 331 (2010).

## Paragraph VII. Community redevelopment.

(a) Each condemnation of privately held property for redevelopment purposes must be approved by vote of the elected governing authority of the city within which the property is located, if any, or otherwise by the governing authority of the county within which the property is located.

The power of eminent domain shall not be used for redevelopment purposes by any entity, except for public use, as defined by general law.

(a.1) The General Assembly may authorize any county, municipality, or housing authority to undertake and carry out community redevelopment.

(b) The General Assembly is also authorized to grant to counties or municipalities for redevelopment purposes and in connection with redevelopment programs, as such purposes and programs are defined by general law, the power to issue tax allocation bonds, as defined by such law, and the power to incur other obligations, without either such bonds or obligations constituting debt within the meaning of Section V of this article, and the power to enter into contracts for any period not exceeding 30 years with private persons, firms, corporations, and business entities. Such general law may authorize the use of county, municipal, and school tax funds, or any combination thereof, to fund such redevelopment purposes and programs, including the payment of debt service on tax allocation bonds, notwithstanding Section VI of Article VIII or any other provision of this Constitution and regardless of whether any county, municipality, or local board of education approved the use of such tax funds for such purposes and programs before January 1, 2009. No county, municipal, or school tax funds may be used for such purposes and programs without the approval by resolution of the applicable governing body of the county, municipality, or local board of education. No school tax funds may be used for such purposes and programs except as authorized by general law after January 1, 2009; provided, however, that any school tax funds pledged for the repayment of tax allocation bonds which have been judicially validated pursuant to general law shall continue to be used for such purposes and programs. Notwithstanding the grant of these powers pursuant to general law, no county or municipality may exercise these powers unless so authorized by local law and unless such powers are exercised in conformity with those terms and conditions for such exercise as established by that local law. The provisions of any such local law shall conform to those requirements established by general law regarding such powers. No such local law, or any amendment thereto, shall become effective unless approved in a referendum by a majority of the qualified voters voting thereon in the county or municipality directly affected by that local law.

(c) The General Assembly is authorized to provide by general law for the creation of enterprise zones by counties or municipalities, or both. Such law may provide for exemptions, credits, or reductions of any tax or taxes levied within such zones by the state, a county, a municipality, or any combination thereof. Such exemptions shall be available only to such persons, firms, or corporations which create job opportunities within the enterprise zone for unemployed, low, and moderate income

persons in accordance with the standards set forth in such general law. Such general law shall further define enterprise zones so as to limit such tax exemptions, credits, or reductions to persons and geographic areas which are determined to be underdeveloped as evidenced by the unemployment rate and the average personal income in the area when compared to the remainder of the state. The General Assembly may by general law further define areas qualified for creation of enterprise zones and may provide for all matters relative to the creation, approval, and termination of such zones.

(d) The existence in a community of real property which is maintained in a blighted condition increases the burdens of state and local government by increasing the need for governmental services, including but not limited to social services, public safety services, and code enforcement services. Rehabilitation of blighted property decreases the need for such governmental services. In recognition of such service needs and in order to encourage community redevelopment, the counties and municipalities of this state are authorized to establish community redevelopment tax incentive programs as authorized in this subparagraph. A community redevelopment tax incentive program shall be established by ordinance of the county or municipality. Any such program and ordinance shall include the following elements:

(1) The ordinance shall specify ascertainable standards which shall be applied in determining whether property is maintained in a blighted condition. The ordinance shall provide that property shall not be subject to official identification as maintained in a blighted condition and shall not be subject to increased taxation if the property is a dwelling house which is being used as the primary residence of one or more persons; and

(2) The ordinance shall establish a procedure for the official identification of real property in the county or municipality which is maintained in a blighted condition. Such procedure shall include notice to the property owner and the opportunity for a hearing with respect to such determination.

(3) The ordinance shall specify an increased rate of ad valorem taxation to be applied to property which has been officially identified as maintained in a blighted condition. Such increase in the rate of taxation shall be accomplished through application of a factor to the millage rate applied to the property, so that such property shall be taxed at a higher millage rate than the millage rate generally applied in the county or municipality, or otherwise as may be provided by general law.

(4) The ordinance may, but shall not be required to, segregate revenues arising from any increased rate of ad valorem taxation and

provide for use of such revenues only for community redevelopment purposes;

(5) The ordinance shall specify ascertainable standards for rehabilitation through remedial actions or redevelopment with which the owner of property may comply in order to have the property removed from identification as maintained in a blighted condition. As used herein, the term “blighted condition” shall include, at a minimum, property that constitutes endangerment to public health or safety;

(6) The ordinance shall specify a decreased rate of ad valorem taxation to be applied for a specified period of time after the county or municipality has accepted a plan submitted by the owner for remedial action or redevelopment of the blighted property and the owner is in compliance with the terms of the plan. Such decrease in the rate of taxation shall be accomplished through application of a factor to the millage rate applied to the property, so that such property shall be taxed at a lower millage rate than the millage rate generally applied in the county or municipality, or otherwise as may be provided by general law.

(7) The ordinance may contain such other matters as are consistent with the intent and provisions of this subparagraph and general law.

Variations in rate of taxation as authorized under this subparagraph shall be a permissible variation in the uniformity of taxation otherwise required. The increase or decrease in rate of taxation accomplished through a change in the otherwise applicable millage rate shall affect only the general millage rate for county or municipal maintenance and operations. A county and one or more municipalities in the county may, but shall not be required to, establish a joint community redevelopment tax incentive program through the adoption of concurrent ordinances. No Act of the General Assembly shall be required for counties and municipalities to establish community redevelopment tax incentive programs. However, the General Assembly may by general law regulate, restrict, or limit the powers granted to counties and municipalities under this subparagraph. (Ga. Const. 1983, Art. 9, Sec. 2, Para. 7; Ga. L. 1984, p. 1709, § 1/HR 444; Ga. L. 1996, p. 1666, § 1/SR 64; Ga. L. 2002, p. 1497, § 1/HR 391; Ga. L. 2006, p. 1111, § 1/HR 1306; Ga. L. 2008, p. 1211, § 1/SR 996.)

**Editor’s notes.** — The constitutional amendment (Ga. L. 2008, p. 1211, § 1), which added subparagraph (a.1); and, in subparagraph (b), inserted “also” near the

beginning of the first sentence, and added the present second, third, and fourth sentences, was ratified at the general election held on November 4, 2008.

**Paragraph IX. Immunity of counties, municipalities, and school districts.**

**Cross references.** — Sovereign immunity and waiver thereof; claims against the state and its departments, agencies,

officers, and employees, Ga. Const. 1983, Art. I, Sec. II, Para. IX.

**JUDICIAL DECISIONS**

**Application to city.**

In a tort action for personal injuries and property damage arising from an auto collision filed against a city and its police officer, the trial court erred in granting a city summary judgment, as: (1) O.C.G.A. § 40-6-6(d)(2) did not apply; and (2) the city waived its sovereign immunity to the extent that it purchased liability coverage to cover the officer’s actions in operating that officer’s police car. But, the trial court properly granted summary judgment to the officer, given that the officer was engaged in a discretionary function of responding to an emergency situation at the time the accident at issue occurred. *Weaver v. City of Statesboro*, 288 Ga. App. 32, 653 S.E.2d 765 (2007), cert. denied, 2008 Ga. LEXIS 221 (Ga. 2008).

Surety sued a city for money had and received stemming from the forfeiture of a cash bond; however, this claim was properly dismissed as Ga. Const. 1983, Art. IX, Sec. II, Para. IX conferred sovereign immunity on the city. *Watts v. City of Dillard*, 294 Ga. App. 861, 670 S.E.2d 442 (2008).

Court of appeals correctly determined that no statute required that a city’s agreement with the Georgia Interlocal Risk Management Agency (GIRMA) had to meet the uninsured and underinsured motorist coverage requirements that an

insurance policy issued by an insurer had to meet pursuant to O.C.G.A. § 33-7-11 because the General Assembly explicitly declared that GIRMA was not an insurer; GIRMA and its liability coverage contracts, and the requirements imposed thereon by statute, exist solely in the context of sovereign immunity, and the statutory waiver thereof. *Godfrey v. Ga. Interlocal Risk Mgmt. Agency*, 290 Ga. 211, 719 S.E.2d 412 (2011).

City was not entitled to sovereign immunity because the city’s “Public Officials Errors and Omissions” insurance policy covered the wrongful termination claims brought by city employees; therefore, consistent with O.C.G.A. § 36-33-1(a), the city was deemed to have waived sovereign immunity to the extent of the limits of the city’s insurance policy covering those claims. *Owens v. City of Greenville*, 290 Ga. 557, 722 S.E.2d 755 (2012).

**City liability for police officer’s actions.** — When officers arrested a decedent who died shortly after the arrest, a city which employed one of the officers could not be held liable because: (1) the city was immune from claims involving police work unless the city waived that immunity; and (2) it was not shown that the city waived immunity. *Hoyt v. Bacon County*, No. 509-026, 2011 U.S. Dist. LEXIS 7330 (S.D. Ga. Jan. 26, 2011).

**SECTION III.**

**INTERGOVERNMENTAL RELATIONS**

**Paragraph I. Intergovernmental contracts.**

**Law reviews.** — For annual survey on local government law, see 64 *Mercer L. Rev.* 213 (2012).

JUDICIAL DECISIONS

**Contract between county and cities.**

Intermediate appellate court erred in holding that because an agreement between a county and cities did not pertain to the provision of services for purposes of the Intergovernmental Contracts Clause, Ga. Const. 1983, Art. IX, Sec. III, Para. 1(a), but was a tax-sharing agreement, it was constitutionally invalid. The court lacked appellate jurisdiction to construe the meaning of “services” as used in the Intergovernmental Contracts Clause, because that term had not previously been construed by the Georgia Supreme Court. *DeKalb County v. City of Decatur*, 297 Ga. App. 322, 677 S.E.2d 391 (2009).

Trial court did not err in granting a county summary judgment in cities’ action for breach of an intergovernmental agreement (IGA) the parties entered into pursuant to the Homestead Option Sales and Use Tax Act (HOST), O.C.G.A. § 48-8-100 et seq., because the IGA was not a valid intergovernmental contract under the Intergovernmental Contracts Clause of the

Georgia Constitution, Ga. Const. 1983, Art. IX, Sec. III, Para. 1(a), since the focus and clear purpose of the IGA was to provide a formula for the distribution of the HOST revenues, and the IGA could not be deemed an agreement for the provision of authorized “services”; the IGA was an agreement about how to divide and distribute HOST revenues between the county and the cities, with the cities agreeing to expend the monies disbursed solely for capital outlay projects to be located within the geographical boundaries of the county and to be owned, operated, or both either by the county, one or more cities or any combination thereof, and the fact that the IGA required the cities to expend the tax proceeds in accordance with the mandates of the Homestead Option Sales and Use Tax Act, O.C.G.A. § 48-8-102, did not transform it into either a contract for services or one for the use of facilities. *City of Decatur v. Dekalb County*, 289 Ga. 612, 713 S.E.2d 846 (2011).

SECTION IV.

TAXATION POWER OF COUNTY AND MUNICIPAL GOVERNMENTS

**Paragraph I. Power of taxation.**

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
INVALID PURPOSES OF COUNTY TAXES

**General Consideration**

**Authority to collect occupation tax.** — Because a second city provided by local ordinance for the levy, assessment, and collection of an occupation tax on businesses and practitioners operating within that city’s limits, the second city had the general authority to collect such a tax under O.C.G.A. § 48-13-6(b), and only the second city was authorized to levy, assess, and collect an occupation tax from busi-

nesses and practitioners at the airport that were located within the second city’s limits to the extent consistent with Ga. Const. 1983, Art. IX, Sec. IV, Para. 1, O.C.G.A. § 48-13-6(b), other applicable statutes, and that city’s own charter, ordinances, and regulations; Atlanta, Ga., Charter, § 7-105(f) is ineffective to the extent it purports to divest College Park, Georgia of the authority to levy, assess, and collect an occupation tax on those businesses and practitioners operating at

the airport and within the city limits of College Park. *City of Atlanta v. City of College Park*, 311 Ga. App. 62, 715 S.E.2d 158 (2011).

**Invalid Purposes of County Taxes**

**Authority of municipality to collect occupation tax.** — First city lacked authority to collect an occupation tax on professional or business activities within a second city’s limits because the first city did not identify any constitutional provi-

sion or general law that authorized the first city to levy, assess, and collect an occupation tax on businesses and practitioners that were not located in that city’s limits, and to the extent an agreement between the cities purported to vest in the first city the authority to collect an occupation tax on businesses located within the second city’s limits, the contract was unenforceable; a contract between municipalities, however, is not a general law. *City of Atlanta v. City of College Park*, 311 Ga. App. 62, 715 S.E.2d 158 (2011).

SECTION V.

LIMITATION ON LOCAL DEBT

**Paragraph I. Debt limitations of counties, municipalities, and other political subdivisions.**

**Law reviews.** — For survey article on local government law, see 60 *Mercer L. Rev.* 263 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CREATION OF DEBT

1. IN GENERAL

**General Consideration**

**Contract between county and cities.** — Trial court did not err in granting a county summary judgment in cities’ action for breach of an intergovernmental agreement (IGA) the parties entered into pursuant to the Homestead Option Sales and Use Tax Act (HOST), O.C.G.A. § 48-8-100 et seq., because the IGA was not a valid intergovernmental contract under the Intergovernmental Contracts Clause of the Georgia Constitution, Ga. Const. 1983, Art. IX, Sec. III, Para. I(a) since the focus and clear purpose of the IGA was to provide a formula for the distribution of the HOST revenues, and the IGA could not be deemed an agreement for the provision of authorized “services”; the IGA was an agreement about how to divide and distribute HOST revenues between the county and the cities, with the cities agreeing to expend the monies disbursed

solely for capital outlay projects to be located within the geographical boundaries of the county and to be owned, operated, or both either by the county, one or more cities or any combination thereof, and the fact that the IGA required the cities to expend the tax proceeds in accordance with the mandates of the Homestead Option Sales and Use Tax Act, O.C.G.A. § 48-8-102, did not transform it into either a contract for services or one for the use of facilities. *City of Decatur v. Dekalb County*, 289 Ga. 612, 713 S.E.2d 846 (2011).

**Creation of Debt**

1. In General

**Contractor’s services approved by voters.** — Multi-year contract a school district entered into with a contractor was enforceable and constitutionally valid be-

cause the contractor’s breach of contract complaint alleged that the contractor’s services under the contract were for projects that the county’s voters had approved

in a referendum for Educational Local Option Sales Tax funding. *Greene County Sch. Dist. v. Circle Y Constr., Inc.*, 308 Ga. App. 837, 708 S.E.2d 692 (2011).

SECTION VI.

REVENUE BONDS

Paragraph IV. Validation.

JUDICIAL DECISIONS

**Action not barred as collateral attack.** — Taxpayer’s petition seeking a declaration that the valuation method a county board of assessors and the development authority of the county used for leasehold estates arising from a local development authority sale-leaseback bond transaction was illegal was not barred for being a collateral attack on concluded bond validation proceedings because the challenge to the memoranda of agreement that set forth the tax assessment formula at issue would only constitute a prohibited collateral attack on a concluded bond validation proceeding if the memoranda were

specifically adjudicated in the proceedings and held valid by the bond judgment, and the board and authority had to put forth evidence that the applicable bond validation orders did in fact expressly rule upon each memorandum of agreement; even if the taxpayer was barred from challenging the tax agreements on concluded bond transactions, the taxpayer also sought an injunction to prohibit the use of the formula in future bond agreements. *Sherman v. Fulton County Bd. of Assessors*, 288 Ga. 88, 701 S.E.2d 472 (2010).  
**Cited** in *Ferdinand v. City of Atlanta*, 285 Ga. 121, 674 S.E.2d 309 (2009).

ARTICLE XI.

MISCELLANEOUS PROVISIONS

Section

I. Miscellaneous Provisions.

SECTION I.

MISCELLANEOUS PROVISIONS

Paragraph

IV. Continuation of certain constitutional amendments for a period of four years.

Paragraph IV. Continuation of certain constitutional amendments for a period of four years.

(a) The following amendments to the Constitutions of 1877, 1945, and 1976 shall continue in force and effect as part of this Constitution until July 1, 1987, at which time said amendments shall be repealed

and shall be deleted as a part of this Constitution unless any such amendment shall be specifically continued in force and effect without amendment either by a local law enacted prior to July 1, 1987, with or without a referendum as provided by law, or by an ordinance or resolution duly adopted prior to July 1, 1987, by the local governing authority in the manner provided for the adoption of home rule amendments to its charter or local Act: (1) amendments to the Constitution of 1877 and the Constitution of 1945 which were continued in force and effect as a part of the Constitution of 1976 pursuant to the provisions of Article XIII, Section I, Paragraph II of the Constitution of 1976 which are in force and effect on the effective date of this Constitution; (2) amendments to the Constitution of 1976 which were ratified as general amendments but which by their terms applied principally to a particular political subdivision or subdivisions which are in force and effect on the effective date of this Constitution; (3) amendments to the Constitution of 1976 which were ratified not as general amendments which are in force and effect on the effective date of this Constitution; and (4) amendments to the Constitution of 1976 of the type provided for in the immediately preceding two subparagraphs (2) and (3) of this Paragraph which were ratified at the same time this Constitution was ratified.

(b) Any amendment which is continued in force and effect after July 1, 1987, pursuant to the provisions of subparagraph (a) of this Paragraph shall be continued in force and effect as a part of this Constitution, except that such amendment may thereafter be repealed but may not be amended. The repeal of any such amendment shall be accomplished by local Act of the General Assembly, the effectiveness of which shall be conditioned on its approval by a majority of the qualified voters voting thereon in each of the particular political subdivisions affected by the amendment.

(c) All laws enacted pursuant to those amendments to the Constitution which are not continued in force and effect pursuant to subparagraph (a) of this Paragraph shall be repealed on July 1, 1987. All laws validly enacted on, before, or after July 1, 1987, and pursuant to the specific authorization of an amendment continued in force and effect pursuant to the provisions of subparagraph (a) of this Paragraph shall be legal, valid, and constitutional under this Constitution. Nothing in this subparagraph (c) shall be construed to revive any law not in force and effect on June 30, 1987.

(d) Notwithstanding the provisions of subparagraphs (a) and (b), the following amendments to the Constitutions of 1877 and 1945 shall be continued in force as a part of this Constitution: amendments to the Constitution of 1877 and the Constitution of 1945 which created or authorized the creation of metropolitan rapid transit authorities, port

authorities, and industrial areas and which were continued in force as a part of the Constitution of 1976 pursuant to the provisions of Article XIII, Section I, Paragraph II of the Constitution of 1976 and which are in force on the effective date of this Constitution.

(e) Any person owning property in an industrial area described in subparagraph (d) of this Paragraph may voluntarily remove the property from the industrial area by filing a certificate to that effect with the clerk of the superior court for the county in which the property is located. Once the certificate is filed, the property described in the certificate, together with all public streets and public rights of way within the property, abutting the property, or connecting the property to property outside the industrial area, shall no longer be in the industrial area and shall upon the filing of the certificate be annexed to the city which provides water service to the property, or if no city provides water service shall be annexed to the city providing fire service as provided under the constitutional amendments that created such industrial areas described in subparagraph (d) of this Paragraph. The filing of a certificate shall be irrevocable and shall bind the owners, their heirs, and their assigns. The term “owner” includes anyone with a legal or equitable ownership in property but does not include a beneficiary of any trust or a partner in any partnership owning an interest in the property or anyone owning an easement right in the property. (Ga. Const. 1983, Art. 11, § 1, Para. 4; Ga. L. 1991, p. 2031, § 1/HR 16; Ga. L. 1992, p. 3335, § 1/HR 997; Ga. L. 1996, p. 1667, § 1/SR 228; Ga. L. 2010, p. 1259, § 1/HR 136.)

**Editor’s notes.** — The constitutional amendment (Ga. L. 2010, p. 1259, § 1), which, in subparagraph (e), in the first sentence, inserted “of this Paragraph” near the middle, and deleted “, but only if the property is located on an island” from the end; in the second sentence, substituted “, shall no longer be in the industrial area and shall upon the filing of the certificate be annexed to the city which provides water service to the property, or if no

city provides water service shall be annexed to the city providing fire service as provided under the constitutional amendments that created such industrial areas described in subparagraph (d) of this Paragraph” for “will no longer be in the industrial area and may be annexed by an adjacent city”; and, in the third sentence, substituted “shall” for “will” twice, was ratified at the general election held on November 2, 2010.









































